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Ag. No. 18.

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SECOND DISTRICT

BERNADINE BISSEKUMER,
Plaintiff-Appellant,

vs.

ROGER BISSEKUMER,
Defendant-Appellee.

At the time this suit was started in the circuit court of Winnebago County, there was pending in this court case No. 9,933 in which the same parties were involved in the same relative position which they occupy in this case. In the former case on appeal the plaintiff lost the suit for a divorce in the lower court and appealed from the judgment thereof, and after notice of appeal had been served, the plaintiff filed a verified petition asking the circuit court to give her the custody of Mary Margaret Bissekumer, Betty Ann Bissekumer and Rogene Bissekumer during the pendency of the appeal, and suitable support money for the children and equitable alimony for support money for the plaintiff during the pendency of the appeal, and also money which would be sufficient to pay the petitioner's appeal. To this petition, the defendant-appellee

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filed a motion, which is as follows: "Now comes Roger Bissekumer, defendant-appellee in the above entitled cause, by Welsh and Welsh, his attorneys, and moves the Court that the petition heretofore filed in this cause on July 21, 1943 be stricken from the files for the reasons:

"Paragraph 1: In Paragraph 1 of the petition, it expressly states that the plaintiff-appellant filed her notice to the Appellate Court for the Second District of Illinois, and praecipe for transcript of the record of proceedings, thereby perfecting the appeal under terms of the Civil Practice Act of the State of Illinois and transferring this cause to the Appellate Court for the Second District of Illinois as of the date of filing of Notice of Appeal, the Trial Court or the Circuit Court of Winnebago County, Illinois, thereby losing any jurisdiction to enter any further orders of any kind or character in this cause from the date of the perfection of the appeal by the plaintiff-appellee.

"Paragraph 2: The Trial Court or Circuit Court of Winnebago County, Illinois, upon the dismissal of the complaint for divorce for want of equity, lost all jurisdiction to hear and determine any question or questions in relation to custody of children, alimony, either temporary or permanent, costs and expenses of appeal, solicitors' fees or determination of the right of possession of the personal property, which matters are the subject-matter of the petition to which this motion is filed.

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"Paragraph 3: The Trial Court or Circuit Court of Winnebago County has lost any and all jurisdiction to enter any orders of any kind or character in this cause until this cause has been remanded or transferred from the Appellate Court of the Second District of Illinois by the proper mandate or remanding order."

The court sustained the motion to strike and found in his decree that because the plaintiff in the divorce case had taken an appeal to the Appellate Court, the circuit court then lost all jurisdiction to grant relief of any kind, or character, or for any purpose, under par. 16 of ch. 40 of the Ill. Rev. Stat. (Jones Ill. Stats. Ann. 109.183).

Whether the trial court was justified in dismissing the petition for the reasons stated is immaterial. In the case of Buehler vs. Buehler, 373 Ill. p. 636, the same question was before the Supreme Court, we find this language: "No authority has been furnished authorizing the Appellate Court to fix solicitors' fees where the wife prosecutes the appeal. The statute, (Ill. Rev. Stat. 1939, chap. 40, par. 16,) provides that in case of an appeal by husband or wife the court in which the decree or order is rendered may require the payment of money for his or her defense pending the appeal. The appeal to the Appellate Court was taken by the wife. The statute does not authorize alimony or solicitors' fees for appellant's solicitor but only for defense pending an appeal."

Under our present statute the appellant was not entitled to an allowance for solicitors' fees for her appeal in her divorce proceedings where she was the appellant.

The judgment of the trial court is affirmed.

Judgment affirmed.

WILLIAM LORIMER, JR., Administrator
of the Estate of William Lorimer, De-
ceased; LA SALLE STREET TRUST & SAV-
INGS BANK, a Corporation; THOMAS
McDONALD; LOUIS H. PINK, Superin-
tendent of Insurance of the State of
New York, as Liquidator of National
Surety Company, Maryland Casualty
Company, Massachusetts Bonding and
Insurance Company, individually and
as Assignee of the Claim of Aetna
Casualty Company,

Appellants,

v.

ROSEHILL CEMETERY COMPANY, a Corpora-
tion; CHICAGO TITLE & TRUST COMPANY,
Receiver of the LaSalle Street Trust
& Savings Bank; CHICAGO TITLE & TRUST
COMPANY, Individually, a Corporation;
CHARLES W. DEMPSTER, Individually and
as Trustee under the Last Will and
Testament of Wesley Dempster, Deceased;
JOHN B. VERCOE, Individually and as
Trustee under the Last Will and Testa-
ment of Arthur W. Vercoe, Deceased;
WILHELMINA PITCHER; the Unknown Heirs
and Devisees of Sarah J. Dempster,
Deceased,

Appellees.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiffs filed their complaint against defendants and, later, an amendment to the same. Defendants filed motions to strike and to dismiss the complaint, setting up a number of grounds in support of the motions. The trial court sustained the motions upon one of the grounds set up therein, viz., that Section 11 of the Banking Act vested exclusively in the receiver appointed by the auditor of public accounts the cause of action set up in the complaint as amended and that, therefore, plaintiffs had no right to institute and maintain the proceedings. Plaintiffs electing to stand by the complaint as amended the trial court entered the order from which they have appealed.

The opinion rendered by the trial court, in ruling upon the motions, gives a full and fair statement of the pleadings,

Figure 1

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Savings Bank;

"(d) that the LaSalle Street Trust and Savings Bank was the successor in interest by assignment of all of the assets of said LaSalle Street National Bank, so that said LaSalle Street Trust and Savings Bank acquired all interest in and to said monies of said LaSalle Street National Bank used by said C. B. Munday and his associates in the purchase of said Rosehill Cemetery Company stock;

"(e) that the contract between the said Munday and his associates and the Lansinghs has never been terminated and forfeited, and that said LaSalle Street Trust and Savings Bank was and still is the beneficial owner of the interest in said shares of stock represented by the monies of said bank used in making payment on account of the purchase price thereof;

"(f) that there were certain collateral notes held by said LaSalle Street Trust and Savings Bank, one for \$65,700.00, secured by 219 shares of said Rosehill Cemetery Company stock and other collateral notes in the approximate amount of \$204,000.00, secured by 352-1/2 shares of said stock;

"(g) that the defendants, Wesley Dempster, Charles W. Dempster and Arthur W. Vercoe, purchased said shares of stock held as collateral as aforesaid from William C. Niblack, as receiver of said LaSalle Street Trust and Savings Bank, paying \$65,700.00 for the 219 shares, and \$105,750.00 for certain notes and said 352-1/2 shares of stock;

"(h) that said shares of stock were reasonably worth at the time of said transfer and purported sale the sum of \$1,000.00 per share;

"(i) that said Niblack and the Chicago Title and Trust Company colluded and agreed with the defendants, Wesley Dempster, Charles W. Dempster and Arthur W. Vercoe, with reference to turning over said shares of stock. Acts of said William C.

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Niblack, while acting as receiver of said bank, of the Chicago Title and Trust Company and of the Dempsters are set up as fraudulent acts with reference to the transfer of said stock, and circumstances are alleged which are set up as notice and knowledge to said Niblack, the Chicago Title and Trust Company and said Dempsters of the value of said stock and the interest of said LaSalle Street Trust and Savings Bank, on account of the monies of said LaSalle Street Trust and Savings Bank used in the purchase of said stock. Inasmuch as the allegations of knowledge and notice are to a large extent cited by the plaintiffs as evidence of fraud, the pertinent allegations of claimed fraud and knowledge and notice may be listed briefly as follows:

"(1) that said Niblack was receiver of said LaSalle Street Trust and Savings Bank in name, but that the Chicago Title and Trust Company was in fact the receiver of said bank, in that all receivership fees of said Niblack were turned over to said Chicago Title and Trust Company; in that employees of the Chicago Title and Trust Company handled all of the business of said receivership; and in that all of the monies of said receivership were handled through said Chicago Title and Trust Company; so that said Chicago Title and Trust Company, from the date of the appointment of said Niblack, as receiver, until the appointment of Chicago Title and Trust Company, as receiver upon the death of said Niblack, was in a fiduciary capacity with reference to the affairs of said LaSalle Street Trust and Savings Bank and including the said shares of stock of said Rosehill Cemetery Company;

"(2) that at all times after the appointment of said Niblack, as receiver, said Niblack and Chicago Title and Trust Company had full knowledge and notice of the fact that the shares of stock of said Rosehill Cemetery Company were of the

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1. *Chrysomelids* - 100

1. *Chlorophyll a* and *Chlorophyll b* were determined by the method of Arar and Collins (1971) using a Shimadzu 1010 spectrophotometer.

DATE: 11/11/2000 TIME: 10:00:00

reasonable value of \$1,000.00 per share. As claimed evidence of this fact, it is alleged that in 1912 an appraisement of the assets of said Rosehill Cemetery was made which showed a value of \$11,181,829.03, which valuation was placed upon the books of said company; that the net value of said assets as shown by the balance sheets of said company for the years 1912 to 1916 showed assets of approximately \$11,000,000.00 for each year; and that the net profits of said Cemetery Company for the years 1912, 1910 and 1914 were in the sum of \$506,398.85. And it is alleged in the complaint as amended that said Niblack, as receiver, and said Chicago Title and Trust Company had full knowledge and notice of said appraisement, of the valuation of the assets of said Cemetery Company placed upon its books, of all of said balance sheets and of the net profits of said company;

"(3) that said Niblack and Chicago Title and Trust Company had full knowledge and notice of the rights of said LaSalle Street Trust and Savings Bank in and to certain shares of stock of said Rosehill Cemetery Company, and as evidence of said fact, plaintiffs allege that said Niblack, as receiver, filed his certain bill in chancery in the Circuit Court of Cook County, against said C. B. Munday and others. A copy of said bill of complaint so filed by said Niblack, as receiver, is attached to the complaint as amended filed herein, and is marked Exhibit 'A'; that subsequently an amendment, marked Exhibit 'B', was filed in said proceeding. The paragraph of said bill which refers to the interest of said LaSalle Street Trust and Savings Bank is paragraph 29 of said bill of complaint as amended, which alleges as follows:

"29. While the said defendants Charles B. Munday, Harry W. Huttig, Joseph O. Morris, Frederick L. Reynolds and Jess Briegel obtained from said National Bank and from said Trust and Savings Bank the moneys used in making the payments hereinbefore mentioned upon the purchase price of said Three Thousand One

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Hundred Fifteen and six-tenths (3115.6) shares of the capital stock of said Rosehill Cemetery Company, by means of loans made by said National Bank and said Trust and Savings Bank to them, or to one or more of them, yet said loans were in fact merely pretended loans for the reason that the sole and only security of any value for the same which said National Bank and said Trust and Savings Bank received from said defendants were shares of the capital stock of said Rosehill Cemetery Company deposited with said National Bank and said Trust and Savings Bank from time to time, being a portion of said shares of stock so purchased as aforesaid with the moneys of said National Bank and of said Trust and Savings Bank, and the repayment of the moneys so pretended to be borrowed depended solely upon value of said shares of stock, they, the said Charles B. Munday, Harry W. Huttig, Joseph O. Morris, Frederick L. Reynolds, and Jess Briegel well knowing and intending that if their said speculative ventures aforesaid turned out to be unprofitable the loss resulting therefrom would be the loss of said National Bank or of said Trust and Savings Bank.' This bill of complaint as amended named the Chicago Title and Trust Company, Rosehill Cemetery Company and others as defendants, and answers were duly filed in said proceedings. The relief prayed in said bill in chancery was that Niblack, as receiver, be declared to be the beneficial owner of said shares of stock of said Rosehill Cemetery Company referred to in said paragraph 29 above set forth, subject to the rights of certain defendants and subject to the payments to be made to said V. R. Lansingh and others. Plaintiffs in this case allege that all of the matters set up in said bill in chancery as amended filed by said Niblack, as receiver, were and still are true in matters of fact and in point of law;

"(4) that the purchase price of said 3115.6 shares of

END OF . . .

... (4.4)

stock by Munday and his associates was at the rate of \$325.00 per share, while the value thereof was \$1,000 per share, and that said 3115.6 shares of said stock represented 62-1/2% of all of the capital stock of said Rosehill Cemetery Company which was 5,000 shares, and that said facts were known to said Niblack and said Chicago Title and Trust Company;

"(5) that the Dempster interests also had knowledge and notice of the interest of said LaSalle Street Trust and Savings Bank in and to said 3115.6 shares of said stock and had knowledge and notice of the actual value of said stock being in the sum of \$1,000.00 per share, and with such knowledge and notice, said Chicago Title and Trust Company, the Dempster interests and Niblack, as receiver, entered into an agreement or plan by which all of the said shares were transferred to the Dempster interests. Certain allegations with reference to acts done and performed in pursuance of said fraudulent plan and agreement are set up in the complaint as amended as follows:

"I. that said Niblack, as receiver, on January 26, 1915 presented to the court in the proceedings in which he was receiver, a petition, in which he recited the substance of the bill that he had filed against Munday and his associates, and further representing to the court that unless a certain note falling due October 1, 1914, with interest thereon, was paid there was danger that the contract of purchase between Munday and his associates and the said Lansings might be forfeited and the beneficial interest of the bank therein be thereby lost; and the direction of the court was requested as to whether he, as receiver, should make the said payments; that said petition of Niblack further represented that the value of said stock was uncertain, whereas said Niblack was well informed as to its real value of \$1,000.00 per share by reason of the books and records of said Rosehill Cemetery Company, of which he had

notice and knowledge and by reason of certain affidavits filed in a certain proceeding then pending in the Superior Court of Cook County, General No. 308793, to which said Niblack, as receiver, was a party; and that in response to said petition the court, on February 1, 1915, entered its order that it would not be advisable that said receiver should use any of the moneys in his hands as such receiver to make any payments on account of the promissory notes given for the said stock, and the court directed that said receiver should not use any of the funds in his hands as such receiver for the purpose of paying said promissory notes;

"II. that the Dempster interests in November, 1915, entered into an agreement with the Chicago Title and Trust Company by which the Dempster interests were to acquire, without the payment of any cash, the said shares of stock of said Rosehill Cemetery Company, and in pursuance of that agreement, the Chicago Title and Trust Company was to pay to itself, as receiver of said Rosehill Cemetery Company, \$65,700.00 with the 219 shares as collateral thereto, and was to pay Niblack, as receiver, the sum of \$105,700.00 for certain notes and 352-1/2 shares which appeared upon the books of the bank as collateral thereto;

"III. that the Dempster interests by said arrangement received 3115.6 shares; that the said arrangement with the Chicago Title and Trust Company was carried out and as a matter of form the Dempster interests executed to the Chicago Title and Trust Company a certain collateral agreement authorizing the dividends on such shares to be paid under the conditions of said agreement between the Dempster interests and said Chicago Title and Trust Company until it received the approximate sum of \$950,000.00, together with interest at the rate of 5-1/2% per annum, and that from time to time the said shares should be delivered to the Dempster interests by the Chicago Title and Trust Company on the basis of

\$400.00 for each share received by said Chicago Title and Trust Company from the dividends of such shares;

"IV. that the said Niblack, as receiver, on February 28, 1918, on his own motion and without notice, dismissed his said bill in chancery, Case No. B7504, against said C. B. Munday and his associates; and that said Niblack, as receiver, received no consideration whatsoever for the beneficial ownership or claim to said shares of stock.

"From the above allegations in the complaint as amended, the plaintiffs conclude that the claim of said LaSalle Street Trust and Savings Bank, as the beneficial owner of said shares, has never been adjudicated and that the LaSalle Street Trust and Savings Bank is still the beneficial owner of said shares; that the Dempsters and the Chicago Title and Trust Company are not innocent purchasers and holders for value without notice of said shares of stock; that said Dempsters and the Chicago Title and Trust Company have no greater or other interest in said shares than the said Munday and his associates had therein; that all payments upon said contract for the purchase of said stock were for the benefit of the bank and its creditors; and that an accounting should be had herein, and that said 3115.6 shares be decreed to be held by the Dempsters in trust for the benefit of the LaSalle Street Trust and Savings Bank and its creditors and stockholders. Incidental thereto other relief is requested.

"With reference to the proceedings instituted by the State Auditor against the LaSalle Street Trust and Savings Bank, in which said Niblack and the Chicago Title and Trust Company were appointed receiver of said bank, the complaint as amended alleges as follows:

"(a) that said suit is still pending and undetermined in this court;

"(b) that the order entered in said cause on February 1,

1915, in which Niblack, as receiver, was instructed not to use any receivership monies to make payment on account of the liability against said Rosehill shares, provided that said order was entered as of that date and contained the words 'unless the court should for good cause otherwise direct';

"(c) that the court in said Circuit Court Case No. B3379 retained full jurisdiction because of said reservation in said order over the question as to whether or not the LaSalle Street Trust and Savings Bank, represented by its receiver, was the beneficial owner of the said shares of stock; and that that question has never been adjudicated or determined by the court in the said cause No. B3379;

"(d) that upon the death of Niblack in 1920, the executor of his estate filed a final report and account of receipts and disbursements in said cause No. B3379; that an order was entered in said cause on December 15, 1920, approving said report of receipts and disbursements; that said account did not contain any mention or reference to the beneficial ownership of said Rosehill shares by said LaSalle Street Trust and Savings Bank, or the said Niblack, as receiver thereof; and that in said order it was recited that all of the other assets of the said LaSalle Street Trust and Savings Bank not mentioned in the account were turned over to the Chicago Title and Trust Company, as successor receiver to said Niblack;

"(e) that a sale of uncollected assets of said LaSalle Street Trust and Savings Bank was made in November, 1924, by the Chicago Title and Trust Company, as receiver of said bank, but that said sale did not include the right of the bank and the claim of the receiver to be the beneficial owner of said Rosehill stock;

"(f) that on January 12, 1932, an order was entered in said cause No. B3379 wherein it was ordered that plaintiffs or

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1. *Chlorophyll a* and *Chlorophyll b* contents were determined by spectrophotometry using the method of Lichtenthaler and Sponholz (1981).

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their predecessors in interest were given leave to file an intervening petition in said cause; that the Chicago Title and Trust Company filed its answer thereto;^{and} that said intervening petition is still pending and undertermined in said court;

"(g) that an order was entered in said cause on January 15, 1932, directing the Chicago Title and Trust Company, as receiver, to file its report therein; that on March 16, 1932, the said Chicago Title and Trust Company, as receiver, filed its report in said cause; that objections were filed to said report and that said report and the objections thereto are still pending and undertermined in said cause;

"(h) that an order was entered in said cause on March 29, 1940, in which it was provided 'that leave is hereby granted to them to sue or institute the necessary proceedings against the receiver, Chicago Title and Trust Company, and others, either by way of an original suit or intervention in the present proceedings, and report to this court from time to time their acts and doings and for further directions and instructions in the premises, as the case may warrant';

"(i) that in said order so entered in said cause on March 29, 1940, it was ordered 'that the court will not at this time remove the said Chicago Title and Trust Company, as receiver, and appoint a successor receiver, but will and does continue this feature of petitioner's motion until the further order of this court';

"The defendants have moved the court to strike and dismiss the complaint as amended, and as grounds therefor assert a number of points of law. In the view taken by the court, it will not be necessary to review all of the points raised in the defendants' motions to strike and dismiss, and the court will only review such portions thereof as is found necessary to a decision thereon.

"An examination of the complaint as amended, with reference to allegations of ownership and title to the beneficial interest in and to said Rosehill shares, after the appointment of Niblack, as receiver of said LaSalle Street Trust and Savings Bank, shows inter alia, as follows:

"(a) It is alleged in paragraph 66 of the original complaint, (p. 39 of complaint) that 'the said Dempsters, taking with full notice of the claims of the said banks, thereby became and still are trustees for the said LaSalle Street Trust and Savings Bank, and the said LaSalle Street Trust and Savings Bank is still the equitable and beneficial owner of all of the said 3115.6 shares of said Rosehill Cemetery Company'.

"(b) It is alleged in paragraph 75 of the original complaint (p. 43 of complaint) that the bill in chancery filed by Niblack, as receiver, was dismissed 'without any consideration whatsoever, going to the said LaSalle Street Trust and Savings Bank, for its beneficial ownership or claim to said Rosehill shares'.

"(c) It is alleged in paragraph 76 (p. 43 of complaint) that the dismissal of said bill 'did not destroy or discharge the claim of the said LaSalle Street Trust and Savings Bank to be the beneficial owner of said Rosehill shares'.

"(d) It is further alleged in said paragraph 76 (p. 43 of complaint) 'that if the said LaSalle Street Trust and Savings Bank was the beneficial owner of such shares at the time the receiver was appointed, it is still the beneficial owner thereof'.

"(e) In other paragraphs of said complaint it is alleged that the LaSalle Street Trust and Savings Bank is the beneficial owner of said shares of Rosehill stock, and in the prayer for relief the relief prayed for is based upon the claim that the LaSalle Street Trust and Savings Bank was and still is the beneficial owner of said 3115.6 shares of said Rosehill Cemetery Company. ^{Company.} L

"The basis of plaintiffs' claimed cause of action is the claimed beneficial ownership of said shares of the Rosehill Cemetery Company by the LaSalle Street Trust and Savings Bank. Without allegation and proof that prior to the receivership of the LaSalle Street Trust and Savings Bank, the said bank was such beneficial owner, the plaintiffs would have no beneficial interest whatsoever in the said shares of stock. The whole right of action claimed by the plaintiffs stems from such claimed ownership by the said bank prior to its affairs being placed in the hands of a receiver, as alleged in the complaint.

"The question then arises as what title to the assets of the LaSalle Street Trust and Savings Bank was acquired by Niblack upon his appointment as receiver, and subsequently by the Chicago Title and Trust Company, as successor receiver.

"Section 11 of the Banking Act provides, among other things, that

"Such receiver, under the direction of the Auditor, shall take possession of, and for the purpose of the receivership, the title to the books, records and assets of every description of such bank, and shall proceed to collect all debts, dues and claims belonging to it. * * * Such receiver shall have authority to sue and defend in his own name with respect to the affairs, assets, claims, debts and choses in action of such bank'.

"In construing this section, the Appellate Court said in McIlvaine, v. City National Bank & Trust Co., 314 Ill. App. 496, on p. 502:

"Title to the bank's assets is conferred only 'for the purpose of the receivership', but for this purpose we think it must be deemed to be exclusive. While authorities of other jurisdictions are in conflict on this question, it is unnecessary to decide on which side of the question lies the greater weight of such authority, inasmuch as sound reason, practical considerations,

analogous decisions in Illinois and section 11 itself point clearly to the exclusive character of the receiver's title, "for the purpose of the receivership".

"This decision is also found in 42 N. E. 93, and the petition of appellants in said cause for leave to appeal to the Supreme Court was denied, so that said decision is final.

"Plaintiffs' counsel urge upon the court and cite authorities with reference to derivative suits, and the title of a receiver appointed in a general equity proceeding. All of the arguments of counsel and the citations with reference to the title of a general equity receiver are answered by the Appellate Court in the McIlvaine case when they say on pp. 503, 504 of said opinion:

"Plaintiffs contend that this suit is brought "to enforce the cause of action of said Central Republic Trust Company." The difficulty with plaintiffs' position in this regard, as we view it, is that the cause of action does not belong to Central Republic Trust Company and, since November 21, 1934, when the receiver was appointed under the provisions of section 11 of the Illinois Banking Act, has not belonged to it. Since said date, the cause of action has belonged to the receiver appointed by the auditor. The principles which underlie derivative suits permit them to be brought when title to a cause of action is in a corporation and its officers and directors wrongfully refuse to bring suit thereon. The receiver of a bank, however, does not step into the shoes of the officers and directors with title to the cause of action remaining in the bank. The Illinois decisions cited by plaintiffs in support of their contention that they are entitled to maintain a derivative suit upon showing that the managing agency of the bank has, either actually or virtually, refused to prosecute the suit, are not bank receivership cases and are inapplicable to the instant question. Farwell v. Great Western Tel. Co., 161 Ill. 522,

The first part of the book is devoted to a general
introduction of the subject. It is followed by a
chapter on the history of the subject, and then
a chapter on the principles of the subject. The
book is divided into two parts. The first part
contains the general principles of the subject, and
the second part contains the application of these
principles to the various branches of the subject.
The book is written in a clear and concise
manner, and is suitable for use as a text-book
in the study of the subject. It is also suitable
for use as a reference work for those who are
interested in the subject. The book is written
in a style which is both clear and concise, and
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the subject. The book is written in a style which
is both clear and concise, and is suitable for
use as a text-book in the study of the subject.

involved a receivership, but a receiver appointed by a court of equity stands in a different relation to the assets which come into his possession than does a receiver appointed under section 11 of the Banking Act. In Heffron v. Gage, 149 Ill. 182, the court said at page 193:

"We have no statute conferring title to property in a receiver who may be appointed by a court, and in the absence of a statute we think it is well settled that the receiver could only acquire title by a conveyance - that the mere order of appointment does not vest title to the property."

"Thus an equity receiver is a mere custodian of assets. Title to such assets, including choses in action, remains in the corporation for which the receiver is appointed. There is no extinguishment of the corporation's title. An equity receiver may be said to be the managing agency of the corporation of which he is the receiver but the receiver of a bank under section 11 of the Banking Act is not the bank's managing agency. His duty is to liquidate, not manage. By section 11 of the Banking Act title to assets, including choses in action, is transferred to the receiver. Hence, if a derivative action may be maintained here, it can only be through the development of some new principle which would enable the stockholder to sue derivatively to enforce a cause of action belonging to the receiver. But, as already stated, plaintiffs are seeking to enforce a cause of action which they claim belongs to the Central Republic Trust Company. Their cause of action is, therefore, misconceived and if it is maintainable, it can only be as a derivative suit to enforce a cause of action belonging to or on behalf of the receiver. This is emphasized by the fact that any recovery which might be obtained would have to be paid to the receiver for distribution among the creditors and stockholders. The prayer of plaintiffs' complaint is that a receiver

be appointed for the purpose of receiving and disbursing the amount of any recovery that may be had. The court could not thus deprive the receiver appointed by the auditor of the right, title and interest which are vested in him by statute. The inability of a court to appoint a receiver, as prayed by plaintiffs, merely indicates the logic of the view that the alleged cause of action is vested solely in the receiver.'

"The court, therefore, holds that the claim or cause of action with reference to the beneficial interest of the shares of Rosehill Cemetery Company vested exclusively in said Niblack, as receiver, and if said claim or cause of action had not been disposed of by William C. Niblack, as receiver, prior to the appointment of Chicago Title and Trust Company, as receiver, then said right or cause of action vested exclusively in said Chicago Title and Trust Company, as receiver of said bank. The court further holds that if said plaintiffs are seeking to enforce a cause of action which they claim belongs to the LaSalle Street Trust and Savings Bank, that the complaint as amended filed herein cannot be upheld or maintained upon that basis.

"If the plaintiffs are attempting to assert a cause of action belonging to or on behalf of the Chicago Title and Trust Company, as receiver of said LaSalle Street Trust and Savings Bank, then as was stated in the McIlvaine case, 'it can only be as a derivative suit to enforce a cause of action belonging to or on behalf of the receiver.' The plaintiffs evidently claim such right because of the claimed fraud, neglect and wrongs alleged to have been committed by Niblack, as receiver, and the Chicago Title and Trust Company, as receiver. The Appellate Court in the McIlvaine case also answers this contention when they say on p. 505:

"Plaintiffs, by this last allegation, admit that the exclusive right to institute proceedings to enforce the alleged cause

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...and the *Journal of the American Medical Association* (JAMA) ...

1. The first group of people who are interested in the study of the history of the United States are the people who are interested in the history of the United States.

8. The following are the names of the persons who have been appointed to the various committees of the Board of Directors:

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Figure 1. The effect of the concentration of the *Agrobacterium* suspension on the transformation efficiency of *Agrobacterium* strains. The number of transformed cells was determined by the number of colonies growing on the selective medium. The results are the mean of three independent experiments. Error bars represent the standard deviation.

— *Journal of the American Medical Association*, 1997

• 1990年12月，在《中国环境报》发表《中国环境状况》一文。

For the purpose of this study, the following hypotheses were formulated:

[illegible]

1. *Journal of the American Medical Association*, 1997; 277: 1033-1038.

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of action was vested in the receiver so long as he performed his duty as such receiver. They leave it to be inferred that by failing to perform his duty the right so vested accrued to the stockholders. We are unable to conceive by what process or operation of law, the right which plaintiffs admit to be vested in the receiver, could, by reason of his alleged neglect of duty, have accrued to them. They apparently seek to make themselves the arbiters of the receiver's alleged neglect of duty. The question whether or not the receiver of the bank "fully performed his duty" is one for the determination of a judicial tribunal and not for private interests. The difficulty with plaintiff's theory is that it involves an interference with the administration of the insolvent bank's assets by the receiver before the fact of his alleged neglect of duty has been judicially ascertained. If a stockholder or creditor can make his own determination that a bank receiver has not fully performed his duty, then he may, under the claim of suing derivatively, arrogate to himself the privilege of enforcing any chose in action belonging to the receiver, which the receiver has failed to press to suit.'

"There has not up to this time been any judicial determination of the claimed fraud of Niblack and the Chicago Title and Trust Company. Up to the time of judicial determination of fraud against them, the plaintiffs in this cause cannot by mere charges of fraud, not yet judicially determined, take unto themselves the cause of action now exclusively vested in the Chicago Title and Trust Company, as receiver.

"With reference to order entered March 29, 1940, in the bank receivership case, in which leave was granted to plaintiffs to sue or institute proceedings against the Chicago Title and Trust Company, as receiver, and others, 'either by way of an original suit or intervention in the present proceedings', the court holds that there has been no adjudication in that case finding the Chicago Title and Trust Company guilty of the claimed

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fraud set up in the complaint as amended filed herein. In that case there was no order directing the Chicago Title and Trust Company to bring suit, and on its failure to sue that the Chicago Title and Trust Company should be removed as receiver. The court in that case, without a hearing and determination of the question as to the fraud and interest of the Chicago Title and Trust Company, could not divest it of any exclusive title that it had to the beneficial interest in and to the said shares of said Rosehill Cemetery Company. That court upon petition did not remove the Chicago Title and Trust Company, as receiver, and has reserved that very question for further consideration. That court now has pending before it the objections of plaintiffs with reference to the final account and report of the Chicago Title and Trust Company, as receiver.

"Further, the complaint as amended herein alleges in paragraph 45 thereof with reference to said cause No. B3379, 'that the court thus retained full jurisdiction over the question as to whether or not the LaSalle Street Trust and Savings Bank, so represented by its receiver, was the beneficial owner of the said shares * * * and that question has never been adjudicated or determined by the court in the said cause No. B3379, which cause is still pending and undetermined.'

"The plaintiffs request that after a hearing herein that a receiver be appointed for a portion of the claimed assets of the LaSalle Street Trust and Savings Bank. (P. 62 of complaint.) This court would have no power under the Banking Act to appoint a receiver for any assets of a bank where proceedings are still pending with reference to the liquidation of the affairs of said bank. That power is vested exclusively in the State Auditor. No request or demand has been made upon the Auditor to compel the Chicago Title and Trust Company to institute proceedings, nor for the removal of the Chicago Title and Trust Company, nor

for the appointment of a receiver for the assets claimed by plaintiffs to be the subject of administration as assets of said bank. The court, therefore, in this proceeding could not grant full relief to the plaintiffs if they should establish a cause of action.

"The court, therefore, holds that jurisdiction of the questions involved herein are pending before the court in said cause No. B3379, and that the court by its order of March 29, 1940, did not divest itself of such jurisdiction and confer upon plaintiffs the right to institute and maintain in a separate proceeding a derivative cause of action, deriving their right and claim as representatives of the receiver now duly qualified and acting in said cause No. B3379.

"The plaintiffs, however, are not without remedy. As is pointed out in Trimble v. Woodhead, 102 U. S. 647, and other cases, the plaintiffs may petition the court in the cause now pending as case No. B3379. Plaintiffs now have pending in said court certain proceedings, and through those proceedings plaintiff can obtain any relief to which they are entitled. The court in that cause can enter appropriate orders with reference to a rule upon the Chicago Title and Trust Company to institute proceedings, for the removal of said Chicago Title and Trust Company and for other relief, if any of such relief is warranted under proper pleadings and proof in said cause.

"The order of the court will be that the motions of the defendants to dismiss the complaint as amended herein will be sustained, but said order will be without prejudice to the rights of plaintiffs to proceed by way of intervention or otherwise in said Circuit Court case No. B3379, and further without prejudice with reference to the merits of plaintiffs' claims and contentions as set forth in the complaint as amended filed herein."

The order reads as follows:

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1. *Chlorophyll a* and *Chlorophyll b* were determined by the method of Lichtenthaler (1987). The total chlorophyll content was determined by the method of Arar and Collins (1997). The carotenoid content was determined by the method of Lichtenthaler and Weil (1983). The total phenolic content was determined by the method of Singleton and Rossi (1965). The total flavonoid content was determined by the method of Zhishen et al. (1999). The total protein content was determined by the method of Lowry et al. (1951). The total carbohydrate content was determined by the method of Dubois and Gilles (1950). The total lipid content was determined by the method of Folch et al. (1957). The total ash content was determined by the method of AOAC (1990). The total acid content was determined by the method of AOAC (1990). The total alkaline content was determined by the method of AOAC (1990). The total nitrogen content was determined by the method of Kjeldahl (1950). The total phosphorus content was determined by the method of Molybdenum blue (1950). The total potassium content was determined by the method of Flame photometry (1950). The total calcium content was determined by the method of Atomic absorption spectrophotometry (1950). The total magnesium content was determined by the method of Atomic absorption spectrophotometry (1950). The total iron content was determined by the method of Atomic absorption spectrophotometry (1950). The total zinc content was determined by the method of Atomic absorption spectrophotometry (1950). The total copper content was determined by the method of Atomic absorption spectrophotometry (1950). The total manganese content was determined by the method of Atomic absorption spectrophotometry (1950). The total cobalt content was determined by the method of Atomic absorption spectrophotometry (1950). The total nickel content was determined by the method of Atomic absorption spectrophotometry (1950). The total selenium content was determined by the method of Atomic absorption spectrophotometry (1950). The total iodine content was determined by the method of Atomic absorption spectrophotometry (1950). The total bromine content was determined by the method of Atomic absorption spectrophotometry (1950). The total fluorine content was determined by the method of Atomic absorption spectrophotometry (1950). The total chlorine content was determined by the method of Atomic absorption spectrophotometry (1950). The total sulfur content was determined by the method of Atomic absorption spectrophotometry (1950). The total oxygen content was determined by the method of Atomic absorption spectrophotometry (1950). The total hydrogen content was determined by the method of Atomic absorption spectrophotometry (1950). The total carbon content was determined by the method of Atomic absorption spectrophotometry (1950). The total nitrogen content was determined by the method of Atomic absorption spectrophotometry (1950). The total phosphorus content was determined by the method of Atomic absorption spectrophotometry (1950). The total potassium content was determined by the method of Atomic absorption spectrophotometry (1950). The total calcium content was determined by the method of Atomic absorption spectrophotometry (1950). The total magnesium content was determined by the method of Atomic absorption spectrophotometry (1950). The total iron content was determined by the method of Atomic absorption spectrophotometry (1950). The total zinc content was determined by the method of Atomic absorption spectrophotometry (1950). The total copper content was determined by the method of Atomic absorption spectrophotometry (1950). The total manganese content was determined by the method of Atomic absorption spectrophotometry (1950). The total cobalt content was determined by the method of Atomic absorption spectrophotometry (1950). The total nickel content was determined by the method of Atomic absorption spectrophotometry (1950). The total selenium content was determined by the method of Atomic absorption spectrophotometry (1950). The total iodine content was determined by the method of Atomic absorption spectrophotometry (1950). The total bromine content was determined by the method of Atomic absorption spectrophotometry (1950). The total fluorine content was determined by the method of Atomic absorption spectrophotometry (1950). The total chlorine content was determined by the method of Atomic absorption spectrophotometry (1950). The total sulfur content was determined by the method of Atomic absorption spectrophotometry (1950). The total oxygen content was determined by the method of Atomic absorption spectrophotometry (1950). The total hydrogen content was determined by the method of Atomic absorption spectrophotometry (1950). The total carbon content was determined by the method of Atomic absorption spectrophotometry (1950).

Figure 1. The effect of the concentration of the *Agrobacterium* suspension on the transformation efficiency of *Agrobacterium* strains.

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• $\frac{1}{2} \times \frac{1}{2} = \frac{1}{4}$ (the probability of getting heads on both coins is $\frac{1}{4}$)

2. *Phragmites* (common in the marshes of the lower Mississippi River and in the coastal marshes of the Gulf of Mexico).

Journal of Management Studies, 19(1), 67-80.

Journal of Management Studies, 19(1), 67-80.

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"This matter coming on to be heard upon the complaint, as amended, and the motion of defendants, Rosehill Cemetery Company, Charles W. Dempster, individually and as Trustee under the Last Will and Testament of Wesley Dempster, deceased, and John B. Vercoe, individually and as Trustee under the Last Will and Testament of Arthur W. Vercoe, deceased to dismiss the complaint, as amended, and the court having heard and considered argument upon that part of defendants' motion pertaining to the jurisdiction of this court to hear and adjudicate the matters set forth in the complaint, and being fully advised in the premises, finds that this court is without jurisdiction in this cause to hear and adjudicate the matters set forth in the complaint herein, and that such part of the motion of said defendants to dismiss the complaint as raises the question of jurisdiction should be sustained.

"It Is, Therefore, Ordered, Adjudged and Decreed that such parts of the motions of defendants to dismiss the complaint, as amended, as relates to the question of jurisdiction be, and the same is hereby sustained and the complaint herein, as amended, is hereby dismissed for want of jurisdiction, but without prejudice to the rights of plaintiffs to proceed by way of intervention or otherwise in said Circuit Court, Cause No. B-3379, and further without prejudice with reference to the merits of plaintiffs' claims and contentions as set forth in the complaint, as amended, filed herein." (Italics ours.)

The McIlvaine case, upon which Judge LaBuy based his ruling, was decided by this Division of the court. In that case the chancellor found that when the receiver was appointed by the auditor of public accounts, under the provisions of Section 11 of the Banking Act, the cause of action that was asserted in the complaint was vested exclusively in the receiver. In an exhaustive opinion, written by Mr. Justice Sullivan, we sustained the ruling

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

of the chancellor, and practically all of the grounds now urged in support of the instant appeal were answered in that opinion. Our ruling involved the determination of an important question, and the refusal of the Supreme court to grant an appeal (316 Ill. App. xiv) was, in effect, an affirmance of our judgment. Nevertheless, we have given due consideration to the arguments of plaintiffs in support of their appeal, but we see no good reason for departing from the ruling in the McIlvaine case.

Plaintiffs contend, however, that the McIlvaine case is not decisive of this appeal because the instant suit was brought by leave of court in the original receivership cause, which is still pending and undetermined. In that cause, Judge Finnegan, on March 29, 1940, entered a lengthy order which contained a number of orders. The pertinent ones read as follows:

"9. It is further ordered, adjudged and decreed that the said injunction heretofore issued on, to-wit: the 19th day of June, 1914, be and it is hereby dissolved so far as it applies to the said petitioners William Lorimer, Jr., and all other stockholders and creditors who desire to join with him, and leave is hereby granted to them to sue or institute the necessary proceedings against the Receiver, Chicago Title & Trust Company, and others, either by way of an original suit or intervention in the present proceedings, and report to this court from time to time their acts and doings, and for further directions and instructions in the premises, as the case may warrant.

"10. It is further ordered, adjudged and decreed that the court will not at this time remove the said Chicago Title & Trust Company as Receiver and appoint a successor receiver, but will and does continue this feature of petitioners motion until the further order of the court."

Plaintiffs base their instant contention upon paragraph 9, but Judge Finnegan, in paragraph 10, refused to remove the

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Figure 1. The effect of the concentration of the H_2O_2 solution on the amount of the released H_2 gas from the H_2 gas-generating system. The amount of the released H_2 gas was measured at 25 °C for 10 min. The concentration of the H_2O_2 solution was 0.01, 0.02, 0.05, 0.1, 0.2, 0.5, 1, 2, 5, 10, 20, 50, 100, 200, 500, 1000, and 2000 ppm. The amount of the released H_2 gas was measured at 25 °C for 10 min. The concentration of the H_2O_2 solution was 0.01, 0.02, 0.05, 0.1, 0.2, 0.5, 1, 2, 5, 10, 20, 50, 100, 200, 500, 1000, and 2000 ppm.

1. *Chlorophyll a* (Chl *a*)

receiver appointed by the auditor, and the receiver, after the entry of the order, still held, by reason of Section 11, the title to the assets, including choses in action. However, we held in the McIlvaine case (p. 504) that the court could not deprive the receiver appointed by the auditor of the exclusive title to the assets, including choses in action, which are vested in him by statute, by appointing another receiver, and we stated, "The inability of a court to appoint a receiver, as prayed by plaintiffs, merely indicates the logic of the view that the alleged cause of action is vested solely in the receiver" appointed by the auditor. But even if we assume, merely for the purposes of this appeal, that Judge Finnegan in some apt proceeding might have judicially found and determined that the receiver was guilty of gross negligence of duty or was dishonest in the performance of his duties and that based upon such findings he had the legal right to remove the receiver and to appoint another, nevertheless, the order in question would avail plaintiffs nothing, and that part of the order that permitted plaintiffs to sue defendants "by way of an original suit" was improvidently entered and it gave plaintiffs no legal right to commence and prosecute the instant suit. It is due Judge Finnegan to state that at the time of the entry of the order the opinion in the McIlvaine case had not been filed.

Defendants have filed in this court a "Motion in the nature of a plea for dismissal of the appeal in the nature of a plea of release of errors, and of acquiescence by appellants in the order appealed from." The motion, the affidavits in support of it, and the argument take up over a hundred typewritten pages. It will be noted that Judge LaBuy, in the judgment order in the instant case, expressly found that the dismissal of the plaintiffs' complaint as amended was "without prejudice to the rights of plaintiffs to proceed by way of

intervention or otherwise in said Circuit Court, Cause No. B-3379, and further without prejudice with reference to the merits of plaintiffs' claims and contentions as set forth in the complaint, as amended, filed herein." It appears that the intervening petition filed by plaintiffs in the bank receivership case and which contains similar allegations to those made in the instant complaint, is still pending in that case and the defendants in their instant motion aver that since the entry of the judgment order of Judge LaBuy the attorneys for plaintiffs in the instant case have taken steps to have the said intervening petition set down for hearing in the receivership case. It appears further that on April 21, 1943, Chicago Title and Trust Company, Receiver, presented a written tender of resignation to the court in the receivership case and that on that day an order was entered that the tender of resignation be filed and the resignation accepted; that on April 26, 1943, the Attorney General appeared in that court, representing the auditor of public accounts, and reported to the court that the auditor had appointed Joseph F. Miller and Martin Gerber as co-receivers to succeed Chicago Title and Trust Company as receiver, and that on that date the court entered an order approving and confirming the said appointments, and appellants, apparently, approved the order. It further appears that on June 7, 1943, the attorneys for appellants, upon a verified petition of the new receivers, had the following order entered by Judge LaBuy, sitting in the receivership cause:

"This cause coming on to be heard upon the verified petition of Martin Gerber and Joseph F. Miller, Receivers herein, and notice of the pendency of said petition having been served on all attorneys of record herein, and the Court being fully advised in the premises,

"It is ordered, adjudged and decreed that William Lorimer, Jr., administrator of the estate of William Lorimer, deceased,

LaSalle Street Trust and Savings Bank, a corporation, Thomas McDonald, Louis H. Pink, Superintendent of Insurance of the State of New York, as Liquidator of National Surety Company, Maryland Casualty Company, and Massachusetts Bonding and Insurance Company, individually and as assignee of the claim of the Aetna Casualty Company, certain stockholders and creditors of LaSalle Street Trust and Savings Bank, may continue to prosecute and pursue all cause or causes of action and claims of LaSalle Street Trust and Savings Bank or its creditors and stockholders and Martin Gerber and Joseph F. Miller, Receivers herein, to recover assets of the LaSalle Street Trust and Savings Bank for the benefit of such receivership estate and the stockholders and creditors of said LaSalle Street Trust and Savings Bank, and all causes of action and claims against Chicago Title and Trust Company, former Receiver herein, and others, and in said connection the said aforementioned stockholders and creditors of LaSalle Street Trust and Savings Bank are hereby authorized to proceed either in their own names or in the names of Martin Gerber and Joseph F. Miller, Receivers herein, or in both their names and the names of said Receivers jointly, for and on behalf of this receivership estate."

It further appears that on June 23, 1943, the attorneys for plaintiffs appeared before the receivership court and asked leave to amend the said intervening petition by making Martin Gerber and Joseph F. Miller, receivers of the LaSalle Street Trust and Savings Bank, co-intervenors and parties petitioner therein and to change the prayer of the petition so that it may ask for substantially the same relief as that which was asked for in the complaint in the instant cause. Defendants contend in their motion that plaintiffs by their said actions are proceeding in the receivership case to obtain the relief which they seek in the instant case and that the fact that the proposed amendment to the

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intervening petition would give them relief against the Chicago Title and Trust Company only, would not justify them in maintaining their instant appeal, as it is the law, defendants argue, that a party who voluntarily acquiesces in a judgment or order against him, even partially, cannot appeal from that order. Plaintiffs, in opposition to the instant motion, state, inter alia, that "If the proper construction of Judge LaBuy's opinion and order appealed from be that we may proceed in case #B3379 against the Chicago Title & Trust Company and the Rosehill Cemetery Company and the Dempsters by adding the names of the receivers or by using the names of the receivers newly appointed by the Auditor as parties plaintiff, notwithstanding the order of Judge Finnegan that we must institute a new suit, then we have no objection to the dismissal of this appeal. * * * If now, by such amendment, the receivers appointed by the State Auditor are made parties plaintiff gives the court jurisdiction over the Dempsters in case #B3379 and such amendment is granted by the trial court then we have no objection to the dismissal of the appeal." As we are affirming the judgment order appealed from we see no necessity for passing upon the merits of the instant motion, and it will be denied. We may say, however, that plaintiffs misinterpret Judge Finnegan's order. It provides that plaintiffs were granted leave to sue or institute the necessary proceedings against the receiver, Chicago Title and Trust Company, and others "either by way of an original suit or intervention in the present proceedings."

We have not intended by anything stated in this opinion to express any opinion as to the merits of the claim plaintiffs seek to assert. The new receivers are aiding the plaintiffs in the prosecution of their claim, and there would seem to be no good reason why plaintiffs, under the present situation, should not have their day in court.

The judgment order of the Circuit court of Cook county is affirmed.
Sullivan, P. J., and Friend, J., concur.

JUDGMENT ORDER AFFIRMED.

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CITY OF CHICAGO,
Appellee,

v.

THEODORE DRYIER,
Appellant.

238 A
APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Defendant Theodore Dryier was charged in a complaint, signed and verified by Leonard Kamenjarin, with a violation of Section 193-1 of the Municipal Code of the City of Chicago, commonly known as the disorderly conduct ordinance. A like charge was made against William M. Kamenjarin in a complaint signed and verified by Theodore Dryier. Both charges involved the same affair and they were consolidated and tried together by the court without a jury. Defendant Dryier was found guilty as charged and was fined twenty-five dollars. He appeals from the judgment entered against him. Defendant Kamenjarin was also found guilty of the charge against him and was fined five dollars. So far as the record shows, he did not appeal from the judgment entered against him.

Defendant Dryier, appellant, contends that "the proceeding, being a quasi-criminal case of the fifth class of cases in the Municipal Court of Chicago, said court was without jurisdiction to hear cause without a jury waiver from the defendant," and that defendant did not waive a jury trial. He cites Section 2 of the Municipal Court Act of Chicago, Ill. Rev. Stat. 1943, ch. 37, par. 357, which provides that the Municipal Court "shall have jurisdiction in the following cases: * * * Fifth. Cases to be designated and hereinafter referred to as cases of the fifth class, which shall include all quasi-criminal actions, excepting bastardy cases," and also cites Section 30 of the same Act, par. 385, which pro-

vides: "That every suit at law in the Municipal Court other than a case of the second class, or a case of the third class, or a case of the fifth class, or a bastardy case, mentioned in section two of this act, shall be tried by the court without a jury unless the plaintiff, at the time he commences his suit, or the defendant at the time he enters his appearance, shall file with the clerk a demand in writing of a trial by jury

* * *." The City contends that the record clearly shows that defendant waived a jury trial. The record shows that "George L. Griffin, Attorney for defendant," entered the appearance of Theodore Dryer and his own appearance as attorney for Dryer. The record further shows that no demand for a jury trial was made by defendant. The following is the preliminary recital in the **bill of exceptions** that was tendered by defendant:

"Record of proceedings had in the above entitled causes before the Honorable Irwin B. Clorfene, one of the judges of said court, sitting at the Stock Yards Police Station, without a jury, (a jury having been waived) at 47th Place and Halsted street, in the City of Chicago, Illinois, on Thursday, September 23rd, A. D. 1943, at about the hour of 10:30 o'clock A. M." The judgment order recites: "Now come the parties to this cause, and thereupon this cause comes on in regular course for trial before the Court without a jury * * *." The bill of exceptions shows that when the two cases were called for trial the trial court announced that both cases would be tried at the same time and the counsel acquiesced in this procedure. The following then occurred: The Court: "I take it that you are ready to go ahead, counsel. Mr. Griffin [attorney for defendant]: That is right." No demand or suggestions for a jury was made by defendant or by his counsel and the court then proceeded to hear the evidence without a jury. The first time that the

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The first part of the report
deals with the general situation
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It is followed by a
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REPORT OF THE

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counsel for defendant raised the question of jury waiver was after the court had made its findings in the cause and a motion to vacate the judgment was being argued. Then the counsel stated: "On the motion to vacate we argue the fact that there is no jury waiver." We are satisfied that the record sufficiently shows that the defendant waived his right to a trial by jury.

Defendant next contends that the "complaint is insufficient in law to sustain the finding of guilty." Counsel for defendant makes the astonishing argument that Section 193-1 of the Chicago City Code is an ordinance derogatory of the common law and therefore must be strictly construed. Assault and battery and breaches of the peace are charges that were recognized and enforced by the common law. Such offenses are probably as old as the common law itself. The ordinance in question is but a reaffirmation of ancient common law offenses. The complaint followed, substantially, the language of the ordinance. Defendant, without the aid of a lawyer, would understand the charge that was made against him, and he adopted a similar form of complaint in making his charge against Kamenjarin. Defendant relies upon People v. Green, 368 Ill. 242, and People v. Chiafreddo, 381 Ill. 214. In the Green case the defendant was charged with a violation of a statute that created a new offense, but that did not describe the act or acts constituting such offense, and it was held that the pleader was bound to set forth the act or acts constituting the offense. The decision has no application to a case wherein the defendant is charged with an offense well known to the common law. In People v. Chiafreddo the defendant was charged with an offense under a statute that created the offense and the statute did not describe the act or acts constituting the offense, and the

Supreme court adhered to the rule announced in the Green case. In the instant case there was no motion to quash or for a bill of particulars and, as we have heretofore stated, the defendant as well as his lawyer could understand from the wording of the complaint the offense charged.

Defendant next contends that the finding of the trial court is against the manifest weight of the evidence. In passing upon this contention we have been forced to read the entire bill of exceptions, as the abstract furnished by defendant is neither a complete one nor a fair one.

On August 21, 1943, about 5:38 p. m., a street car north bound on Racine avenue, on its way to the barn, came to a stop at 69th street for the purpose of switching into 69th street and to the west. The conductor of the street car was Patrick Walsh and the motorman was Michael Hawley. About the same time an automobile, north bound on Racine avenue, driven by William M. Kamenjarin (hereinafter also called Kamenjarin, Jr.), and in which his father, Leonard Kamenjarin (hereinafter also called Kamenjarin, Sr.), and his mother were riding, had approached the intersection. Kamenjarin, Sr., said to the conductor, who was reaching for the switch handle, "You had better drop the handle, mister. If the car continues it will tear the side off of our car." The conductor suggested that the Kamenjarins back the automobile up; he also hollered, "I can't drop it. One truck is on the curve." Kamenjarin, Sr., had been in the employ of the street car company for many years. He told the street car employee that he was accustomed to the switching of cars and that all the employee had to do was to drop the switch handle and let them go by. While the dispute between the said parties was continuing, Patrick King, a street car conductor, was standing on the east side of Racine avenue waiting to go to work, and he decided to take part in the discussion. The evi-

dence for the City is to the effect that King said he knew Kamenjarin, Sr.; that he was a bastard and had stolen material from the street car company. King testified that he merely told the Kamenjarins that it would be better for them to back up and let the car go, so that the traffic would not be tied up in the street; that Kamenjarin, Sr., said to the son, "Run over him and kill him," but that the son did not do that. About this time Kamenjarin, Jr., got out of the car and said to King, "Don't you accuse my father of things like that." While a discussion between the Kamenjarins and King was going on the defendant, Dryier, a motorman on a south bound car, got off of his car and went over to where King and Kamenjarin, Jr., were and hit Kamenjarin, Jr., on the head. The evidence for the City is to the effect that Dryier had a steel object in his hand at the time. The testimony for the defendant is to the effect that when the defendant went toward Kamenjarin, Jr., and King, the former was pushing the latter toward a hole where they shot beer down into a basement. There was evidence for defendant to the effect that defendant struck Kamenjarin, Jr., with his hand and that then the latter hit his head against a sign on the building. The evidence for the City is to the effect that Kamenjarin, Jr., did not hit his head against the sign on the building or any other object after the defendant struck him and that Kamenjarin, Jr., was not pushing King at the time that defendant struck Kamenjarin, Jr. We may add that the testimony of an impartial witness, Hamilton, supports the testimony of the Kamenjarins. After Kamenjarin, Jr., was struck he went to a drug store on the corner, where he became sick from loss of blood and was taken out of the drug store on a stretcher and to an ambulance that took him to St. Bernard's hospital. The City attempted to prove the nature of the in-

juries sustained by Kamenjarin, Jr., and the hospital treatments that he received, but upon objection by the defendant that such evidence was immaterial the trial court sustained the objection.

The trial court saw and heard the witnesses and had a better opportunity to pass upon their credibility than we have. He stated that he disbelieved the testimony of some of the defendant's witnesses and expressed the opinion that while Kamenjarin, Jr., was stubborn in insisting upon having the right of way over the street car company, there was no question in his mind but that the defendant hit Kamenjarin, Jr., with an instrument, and that he had no right to hit him; that "He [Dryier] struck his nose into an argument between two others." The finding of the court that, without right, defendant, Dryier, hit Kamenjarin, Jr., with an instrument, is abundantly supported by the evidence, and the result that followed the blow refutes the claim of defendant that he struck Kamenjarin, Jr., only with his hand. A careful consideration of the evidence satisfies us that the instant contention is without merit.

The last contention of the defendant is that "Ordinance on which complaint is based * * * being derogatory to the common law must be strictly construed. Ordinance, as passed by the City Council, contains no sub-section 7 and an attempt on the part of the pleader to so sub-divide the complaint merely to suit his convenience must of necessity void same." We take judicial notice of the great volume of business handled by the Municipal court of Chicago and that printed forms are necessary in order to handle its business expeditiously. Section 193-1 is very lengthy and contains a statement of many acts that come under the head of disorderly conduct. The printed form used is so drafted that it covers all of the acts mentioned in Section

193-1, and in the instant case all of the acts contained in the printed form were stricken out save the one upon which the City wished to proceed against the defendant, viz., "(7) Did willfully assault another, or was engaged in aiding or abetting, in a fight or quarrel or other disturbance." Thus the defendant was notified as to the specific disorderly conduct charge against him. The procedure followed worked to the advantage of defendant: not to his disadvantage. The defendant makes the strained argument that the use of the numeral (7), in parenthesis, voids the complaint, as that numeral is not in the ordinance. This contention is without the slightest merit.

If the trial court erred it was because he did not sufficiently punish the defendant for his wanton act.

The judgment of the Municipal Court of Chicago is affirmed.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Friend, J., concur.

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A

GERALD T. WILEY, FRANK R. REID
and CHARLES A. O'CONNOR,

APPEAL FROM

Appellants,

SUPERIOR COURT

v.

CARYL FRANK MacARTHUR MICHELMORE,

COOK COUNTY.

Appellee.

3211 370

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order denying plaintiffs' petition to vacate an order dismissing plaintiffs' cause for want of prosecution, discharging the garnishees, and dismissing the attachment against the garnishees.

September 16, 1941, Plaintiff Wiley filed an affidavit in attachment, stating that Caryl Michelmore was indebted to him for legal services in the sum of \$2,500 and that she was not a resident of Illinois but resided in St. Paul, Minnesota. Bond having been given, the writ of attachment on September 16 issued to attach the property of Caryl Michelmore and summoned the co-partners in the law firm of Kirkland, Fleming, Green, Martin & Ellis as garnishees.

October 27, 1941, Plaintiff Wiley filed the complaint alleging that he furnished legal services at the instance and request of Caryl Michelmore, who, notwithstanding her promises had refused to pay for the services rendered, the fair value of which was \$2,500. November 28, 1941, Caryl Michelmore filed her answer. May 1, 1942, the garnishees filed their answer. November 30, 1942 an amended complaint was filed by leave of court making Frank R. Reid and Charles A. O'Connor additional plaintiffs. January 27, 1943, Caryl Michelmore answered the amended complaint.

It appears from the record that nothing further transpired in the proceeding until June 10, 1943, when the garnishees were discharged and the attachment and cause dismissed for want of prosecution.

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June 14, 1943 Defendant Caryl Micheltmore was served with notice that plaintiffs would, the following day, present a petition asking that the order of dismissal be vacated and the cause reinstated. June 17, 1943 an order was entered denying the prayer of the petition. June 18, 1943 notice of appeal was filed by plaintiffs from the order of June 17, 1943 denying the petition to vacate.

June 28, 1943, plaintiffs served notice on Caryl Micheltmore, defendant, and the garnishees that they would present a petition July 1, 1943, praying that the order of June 10th dismissing the cause be vacated and the cause reinstated. July 2, 1943, an order was entered denying the petition. July 8, 1943, plaintiffs filed an "Amended Notice of Appeal" from the dismissal order of June 10th and orders of June 17 and July 2, 1943 denying plaintiffs' petitions to vacate.

A motion was made in this court by Caryl Micheltmore to strike from the record and abstract certain pages containing the petition filed by plaintiff July 1, 1943 and the "Second Notice of Appeal" filed July 8, 1943. In objecting to the allowance of the motion plaintiffs say there was no "Second Notice of Appeal", but an amended notice of appeal under Rule 33 (5) Supreme Court of Illinois. Rule 33 of the Supreme Court was amended in 1937 by adding sub-section 5 relied upon by the plaintiffs. That sub-section authorizes amendments to the notice of appeal "on written motion" to supply certain requirements set forth in the preceding sub-sections. It provides that where the record has been transmitted to the reviewing court, the application for leave to amend should be made in that court, otherwise application should be made in the trial court. It also provides that amendments should relate back to the time of the filing of the notice of appeal. The record does not show that

plaintiffs made a written motion or applied in any wise to the trial court for leave to amend. Assuming that written application had been made, however, it is plain from the sub-section that any amendment would relate back to the original notice of appeal, accordingly, it could not include any order, etc. entered subsequent to the original notice. The motion is allowed and we shall not consider the petition filed July 1, or the order entered July 2, 1943.

Plaintiffs contend the trial court committed error in refusing to vacate the dismissal order and reinstate the cause, because good cause and diligence was shown by the plaintiffs. The record shows that the Executive Committee of the Superior Court of Cook County on May 5, 1943, pursuant to Section 4 of Rule 22-A of the Superior Court Rules, entered an order directing that a typewritten list of all pending common law jury and non-jury cases filed on or before April 30, 1942, and not on printed trial calendars or noticed for trial on or before April 30, 1943; assigning a judge to call that list of cases and, among other things, that if the defendant should respond and the plaintiffs not, the cause to be dismissed on motion of defendant or by the court; and that any order of dismissal might be vacated and the cause reinstated any time within 30 days from the dismissal order for good cause shown, etc. Pursuant to that order, notice thereof was published in the Chicago Law Bulletin on May 6, 7, 8, 10, 11, 12, 13, 14, 15, 17 and 18, 1943. The published announcement stated that copies of the Special List could be had from the Clerk of the Superior Court.

On May 17, 1943, the Executive Committee amended the order of May 5, but not materially and notice of the entry of that order was announced by publication in the Chicago Law Bulletin on May 19, 21, 22, 24, 25, 26, 28, 29 and 31, and June 1, 2, 3, 4, 5, 7, 8, and 9, 1943, which said announcement likewise stated that copies of the Special List were available.

The case at bar, not having been noticed for trial, appeared in the published list of cases on May 14, 1943 and again on June 9, 1943.

Because of our ruling upon the motion hereinbefore decided, we shall consider only the petition filed June 16, 1943, to determine whether or not the trial court abused its discretion in refusing to vacate the order of dismissal and to reinstate the cause. The petition recites the nature of the action and the attachment; that the cause is at issue and that Wiley had submitted himself to depositions and "had promised" defendant's attorney, the other plaintiffs would be available for depositions, after which the cause could be noticed for trial and placed upon the trial calendar; that Plaintiff O'Connor was a Circuit Court Judge in Kane County, busily engaged in hearings and trials and unable to come to Chicago for a deposition and that Plaintiff Reid has been almost constantly engaged in Washington, D. C. and New Orleans, La., and that on June 10, 1943 the cause had been dismissed and the garnishees discharged because Wiley through inadvertence "failed to observe said case on said call and, therefore, was not present in court"; and that he had just learned of the dismissal and had a meritorious cause, and would proceed diligently to a conclusion. We presume that the trial court had before it the pleadings in the case, including the answer and amended answer of the Defendant Caryl Micheltore which set up the affirmative defense that plaintiffs' cause of action did not arise within 5 years immediately preceding the filing of the complaint and was barred by the Statute of Limitations. No reply to the answer or amended answer had been filed when the trial court considered plaintiffs' petition to vacate. The petition does not refer to that affirmative defense.

It is true that the affidavit for attachment states that Garyl Michelmores is not a resident of Illinois, but there is nothing in the record to indicate when she left Illinois, or how long she had been a non-resident. Setting aside consideration of other weaknesses in plaintiffs' petition, the statement that plaintiffs had a meritorious case had to give way to the record as the trial court found it. Under the circumstances which surround the cause and the petition when considered by the trial court, we believe that the trial court had no other alternative but to take Garyl Michelmores's answer as true. Gatt v. Cecil, 363 Ill. 510; nap. 110, Sec. 164 Ill. Rev. Stats. Taking her answer as true, even assuming that plaintiffs showed good cause in their petition, it was apparent that the cause had no merit.

We need consider no other point. The order is hereby affirmed.

ORDER AFFIRMED.

PURKE, P.J. & LUND, J. CONCUR.



✓42925

JAMES OAKLEY KOONTZ,
Appellant,
v.
PUBLIC SERVICE COMPANY OF NORTHERN
ILLINOIS,
Appellee.

APPEAL FROM
MUNICIPAL COURT

12-10-43

322 11-10-43 212 ✓

MR. JUSTICE RILEY DELIVERED THE OPINION OF THE COURT.

This is a contract action in which plaintiff seeks to appeal from an order denying his motion for leave to amend his statement of claim.

The record does not contain the statement of claim. The first step evidenced by the record is plaintiff's motion of August 10, 1943 for leave to file an amended statement of claim. The motion was continued to September 15. The next step is plaintiff's motion of September 22, 1943 to set the case for trial. It appears from the notice of that motion that the files in the case were missing and that plaintiff proposed to have the file traced. September 23, 1943, an "Amended Complaint * Statement of Claim" was filed in which plaintiff claimed that for many years before August 1, 1938, he had contracted with the defendant for gas and electricity service into his house at 512 Ingraham Avenue, Calumet City, Illinois and, pursuant to the contract, paid the monthly charges for the services; that August 1, 1938, defendant through its servants forcibly entered the house, disconnected the service when there was no arrears in payment and without fault of plaintiff's, who had no other system of cooking, or lighting his home; that he demanded resumption of the service; that the demand was refused, plaintiff's home became useless and his family was compelled to eat in restaurants and live in the dark house for 60 days, to the damage of plaintiff of \$2.75 per day; and that he applied to the Illinois Commerce Commission where it was decided that plaintiff should deposit \$12.50 instead of \$25.00, which



defendant had demanded for the restoration of service and that plaintiff made the deposit under protest. Plaintiff sues for his damages.

September 29, 1943, plaintiff made a motion to amend the second paragraph of the statement of claim and the amended statement of claim to change the date upon which the alleged cause of action occurred, from August 1, 1938 to August 15, 1938. The motion was denied and plaintiff filed a notice of appeal from the order of denial.

After the praecipe for record was filed, plaintiff on October 4, 1943, filed a petition in the trial court stating that the files had been lost without his fault or neglect and prayed that a copy of "A Second Paragraph Statement of Claim" filed in the above entitled cause be substituted in lieu of and with the same effect as the original. On the same day an order was entered restoring "a copy of plaintiff's proposed amendment to Statement of Claim first presented to the court on August 10, 1943, for filing and for which leave to file has been denied." October 4, a further order was entered denying plaintiff's motions presented August 10, 1943, September 23, 1943 and September 29, 1943 for leave to amend the statement of claim. This order was entered nunc pro tunc as of September 29, 1943.

Section 77 of the Civil Practice Act, Chapter 110, Par. 201, Ill. Rev. Stats. limits appeals to "final judgments, orders or decrees;" and orders granting a new trial upon leave of the reviewing court. Section 78, Par. 202 authorizes appeals to this court from interlocutory orders or decrees granting injunctions, or overruling motions to dissolve the same, or enlarging the scope of an injunction order, or appointing receivers, or giving other or further powers or property to receivers already appointed. No other right of appeal is granted. The order from which plaintiff seeks to appeal in this case is not a final order. It makes no final disposition of the case. It is an interlocutory order, but not such as is appealable. There is no right to this

appeal, therefore, and we have no jurisdiction to entertain an appeal. The cause is still pending in the trial court for further proceeding. The appeal is, therefore, dismissed.

Appeal Dismissed.

BURKE, P.J. AND LUFF, J. CONCUR.

1. The first part of the report is devoted to a general
description of the work done during the year.
2. The second part contains a detailed account of the
results of the experiments conducted.

3. The third part discusses the conclusions drawn from the
results.

43198

THE PEOPLE OF THE STATE OF ILLINOIS,

Defendant in Error,

v.

FRANK BRAUNE, (Impleaded),

Plaintiff in Error.

NO. 10

CRIMINAL COURT

COOK COUNTY.

MR. JUSTICE KILAY DELIVERED THE DECISION OF THE COURT.

Defendant after trial by jury was convicted in the Criminal Court of Cook County of conspiracy to commit an abortion (Chap. 38, Sec. 46, Par. 139 Ill. Rev. Stats.) and was sentenced to 12 months in the County Jail and to pay a fine of \$2,000. He has prosecuted this writ of error to reverse the judgment.

The indictment consisting of four counts charged that defendant and one "Mary Roe" upon the 28th day of April, 1943, unlawfully conspired with each other and with "diverse other persons, whose names are unknown", to cause Anna Karg to have a miscarriage when not necessary for the preservation of her life. The first two counts charge that Anna Karg was then pregnant and that the alleged conspirators had reason to believe and did believe that fact. The last two charge that the conspirators had reason to and did believe that she was pregnant.

Motions were made by defendant to quash the indictment and for a bill of particulars aimed at identifying "Mary Roe" and particularizing the acts charged. Both motions were overruled and no error is assigned on the rulings.

The defendant contends in this court that there was no proof of conspiracy; that cross-examination of the complaining witness was unduly limited; that competent and material evidence was excluded

and improper and incompetent evidence admitted; that he was prejudiced by the conduct and argument of the prosecutors; that the verdict was contrary to the evidence and law; and that the court committed error in denying his motion for a new trial and in arrest of judgment.

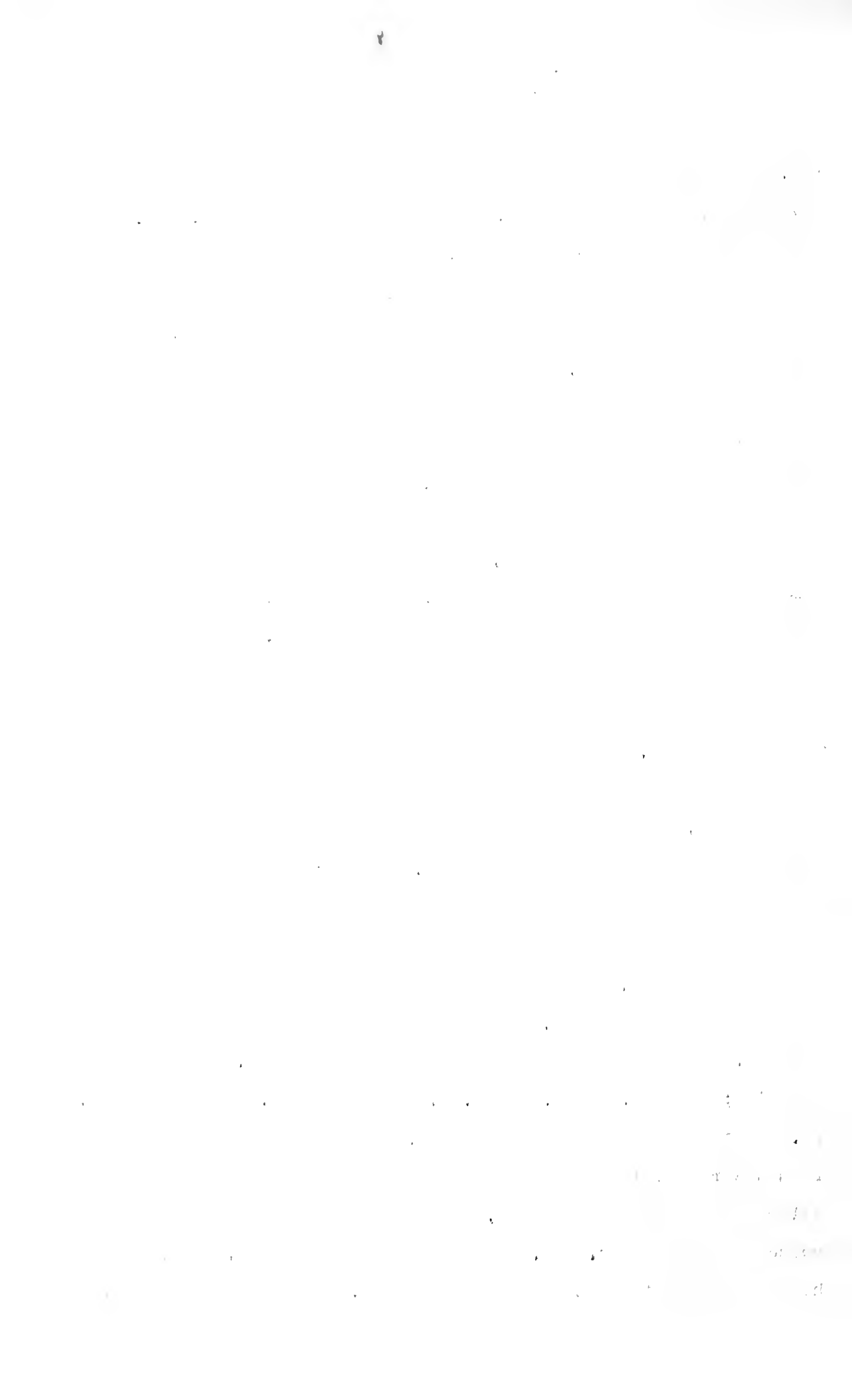
In support of the first contention the defendant argues that there was no proof that he or anyone else conspired with anyone; that the evidence showed no conspiracy as to his receptionist or alleged nurse, and that he could not conspire with himself. Anna Karg, a 18 year old high school girl, had intercourse with her "boy friend" in December, 1942 and thereafter, to the time of the transaction subject of the indictment, had not menstruated. At the time she was in charge of the children of a family with whom she lived. There is testimony that believing that she was pregnant, Anna Karg went to defendant's office to engage him to perform an abortion; that after discussing her condition and purpose with the receptionist, an appointment with the defendant was made for her; that he examined her April 26, 1943, telling her she was pregnant; that he treated her April 27, causing pain in the vaginal region and inserted packing; that the nurse who prepared her gave her pills following this treatment and the receptionist told her not to worry, she had to go through with it; that April 28 she was attended by the nurse and defendant, gas was administered, she lost consciousness and awoke with abdominal pains; that she was very sick the next day and was advised by telephone by defendant to drink liquids and to apply ice packs; that two days later she requested the nurse to have the defendant call and see her, and the nurse advised her to apply ice packs; and that defendant did not call and early the next morning she was examined at her home by a Dr. Seegal who ordered her taken to the County Hospital.

On cross-examination Anna Karg admitted lying about her name and said that she had always been somewhat irregular in menstrual periods.

The defendant complains that Braune only was indicted, tried and convicted by a legal device designed to circumvent rules of evidence. The fact that neither the receptionist nor the nurse are identified by name in the indictment or in the proof is no objection, (People v. Dewey, 259 Ill. App. 330) for it is enough, even if the evidence shows that the defendant conspired with a person not named as a defendant. Anstess v. United States, 22 Fed. (2) 594. Braune says the State could have included the receptionist or nurse by name, since the doctor's records were in the hands of the prosecution. Suffice to say that no point is made here of the sufficiency of the indictment and there was no requirement that the receptionist or nurse be named. He agrees that more than one person must be shown guilty to sustain a conviction for conspiracy. Commission of the crime requires two or more conspirators, but it was not necessary to the conviction of Braune that "every one" be convicted. People v. Dewey, 259 Ill. App. 330. Braune agrees that a conspiracy may be inferred from the acts of co-conspirators. A conspiracy is rarely proved by direct evidence. Anstess v. United States, 22 Fed. (2) 594; People v. Leafeldt, 310 Ill. 441 and Ochs v. People, 124 Ill. 399. He contends that the State's case rests upon inference built upon inference. He believes that the evidence recited was sufficient to take the question of the conspiracy to the jury if there was evidence of pregnancy. There is no piling of inference upon inference here. Inferences were required to bridge the gap between the complaining witness' first conversation with the receptionist and her second conversation which arranged the appointment with the doctor. The inference is, and we think fairly so, if the complaining witness's testimony is true, the receptionist discussed the witness' condition and purpose to the doctor. The nub of the case is the

unlawful agreement and it is not necessary to prove that the conspirators agreed in terms. People v. Drury, 335 Ill. 539. If the complaining witness is telling the truth that she was pregnant and went to the doctor for an abortion, and the doctor examined her and found she was pregnant and performed the abortion, then it is a fair inference, if it is not direct evidence, that both receptionist and the other nurse knew that the object to be attained was illegal and that each one of them was in a combination with the defendant to pursue the illegal end. The conversation testified to by the witness that the receptionist told her not to worry, that she had to go through with it, was direct evidence as was the testimony that the doctor and nurse, side by side, performed some acts pertaining to Anna Karg's vagina and abdomen.

Braune contends there was no evidence that Anna Karg was pregnant and no proof that the alleged abortion was not necessary to save her life. While there was no direct evidence that the alleged abortion was not necessary for the preservation of the life of Anna Karg, there was sufficient evidence from which a fair inference of the fact could be drawn. In addition to his complaint that there was no evidence that Anna Karg was pregnant, Braune says there was no proof of any kind that would begin to make a case of simple abortion. There was no necessity that the proof make out a case of simple abortion. The gist of the offense was not the abortion, but the conspiracy to perform the abortion. 14 Annot'd. Cases 156; State v. Davis, 164 S. E. 732; People v. Drury, 335 Ill. 539. As to the question of pregnancy, in addition to the testimony of Anna Karg relating to her pregnancy and conversations with, and action of the doctor and nurse, there is the medical testimony produced by the State. Dr. Seegal examined her May 1, 1943, while she was in bed at the home of her employer. She was acutely ill,



very pale and that her abdomen was distended, rigid and extremely tender. His opinion at the time was that she was suffering from peritonitis and that he sent her to the County Hospital. Dr. Kaplan, an interne at the County Hospital, made a bimanual and instrumental examination when Anna Karg was brought there about 3 A.M. May 1, 1943. He found in addition to the condition observed by Dr. Seegal, that the opening of the womb was larger than normal; and the cervix was inflamed and emitting a discharge. His diagnosis after a complete examination was, an incomplete septic abortion with a generalized peritonitis. He prescribed treatment and medication, some of which was to help contract the uterus and expel remaining contents. We believe this was sufficient evidence on the question of pregnancy to take the case to the jury.

In the cross examination of Anna Karg, defendant's attorney sought to show that she was in the employ of an Assistant State's Attorney at the time of and a short time before the trial. The court precluded the testimony as to who was paying the witness for her work, after she testified that she was caring for the children of her employer and how many children there were. The defendant says the jury had a right to know who the girl was, with whom she lived, how she lived, whether she received compensation from the State and how much, whether she discussed the case with her employer, how she happened to be living there and whether she expected any reward; and especially he says where the complaining witness' testimony is uncorroborated. The witness' testimony was not entirely uncorroborated, but in certain respects there was only the testimony of the complaining witness against that of the defendant. It was important, therefore, that the defendant be given every opportunity to develop whatever factors reasonably bore upon the credibility and interest of the witness or of her employer in the case. It was not necessary that the defendant disclose the purpose for which he wished to develop

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the cross-examination (Alford v. United States, 282 U. . 687), but it appears from an affidavit filed in support of a motion for a new trial that the witness was in the employ of an Assistant State's Attorney of Cook County. We think defendant should have been permitted to bring to light the circumstances of the witness' employment in order that the jury could have every opportunity to appraise her testimony. This is especially true where the witness was alleged to be in the employ of one so closely related to the prosecution of the case. (Alford v. United States, 282 Ill. 687). We recognize that the extent of the cross-examination was in the discretion of the trial court, but we think the limitation imposed on defendant's attorney was unreasonable. The court was not pressed to rule on several of the objections made by the prosecution to questions aimed at eliciting information which would identify the witness' employer as the Assistant State's Attorney, nevertheless, it is apparent from a study of the colloquy that the cross-examination was unduly limited.

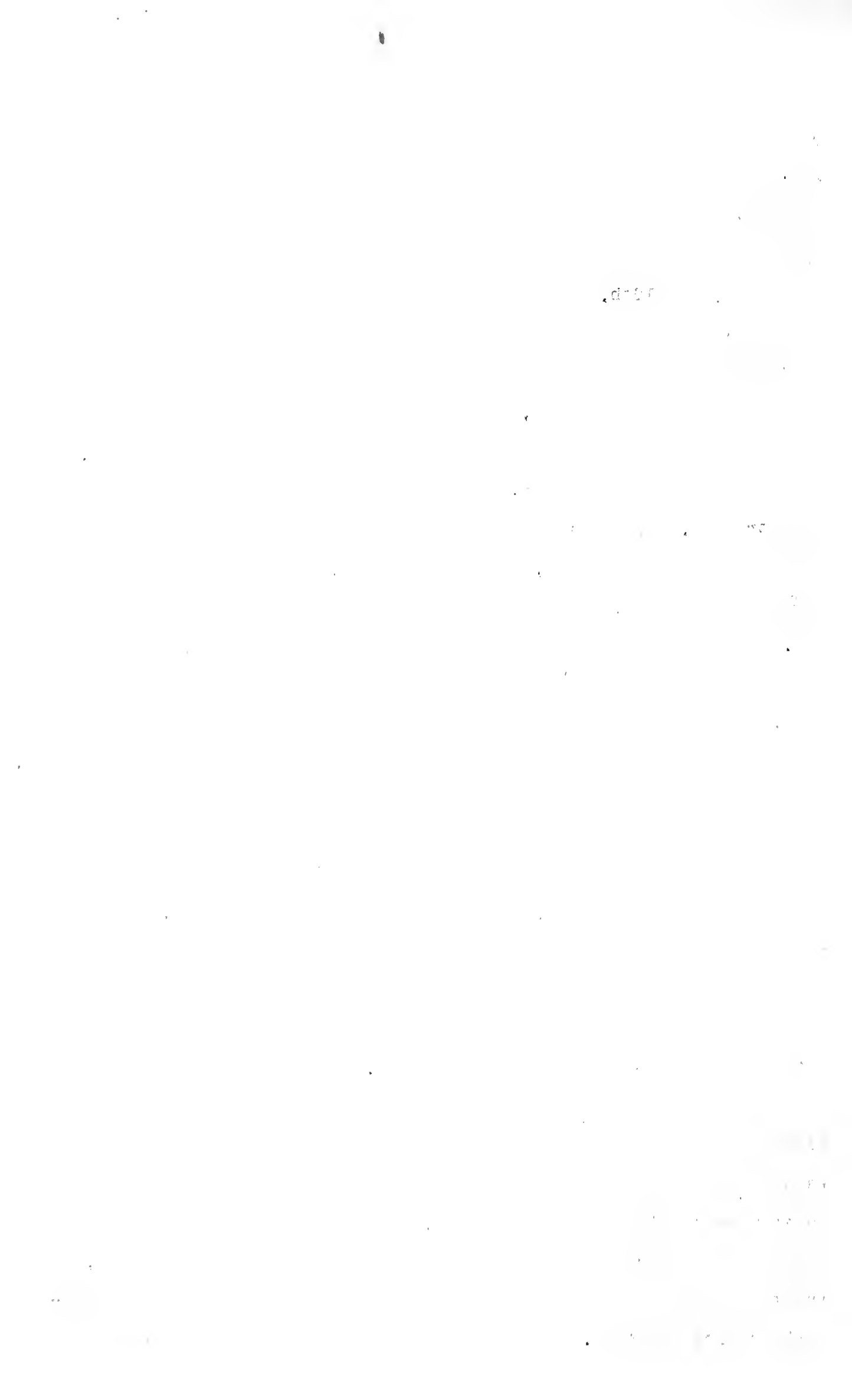
Complaint is next made of the exclusion by the trial court of certain copies of reports made by defendant to the government in connection with tax laws and which were offered for the purpose of showing that defendant had no such employees as the complaining witness testified to. We think these records were properly excluded as purely self-serving documents. The same may be said for books, records and receipts which were excluded.

Defendant testified on direct examination that the reason why complaining witness could not locate him on April 30th, as she testified, was that he was on his way to Fort Smith, Arkansas by rail. He then sought to show how he happened to be on the trip. The court refused to permit this testimony. On cross examination he testified that he knew months in advance that he was going to Arkansas, although



he had made appointments on each day early in May for from 17 to 25 persons; and that he went to Arkansas for one day and then to Denver and learned for the first time that there was a warrant for his arrest on Monday, May 16th. A consideration of part of the argument of the prosecution on this point will indicate why the defendant was prejudiced by the refusal of the court to permit the testimony as to the reason for his trip. "The same man placed her in that position who had violated the laws of man and the ethics of his profession. Where was he? He left town. He did not care whether this little girl died or not". And again " * * * and when he had an opportunity to do it for the person whom, by his own hands, was placed right on the threshold of death, he ignored her completely and would not go near her. She was there and he caught a train and left town". Defendant should have been given the opportunity to state the reasons for the trip, so that the jury could weigh whatever favorable inferences it might draw therefrom against those suggested and argued by the State. We think the exclusion of this testimony was highly prejudicial.

The next contention is that the court erroneously admitted testimony of the complaining witness of conversations, out of the presence of the defendant, with the receptionist and nurse. It is his contention that the corpus delicti of the conspiracy could not be proved by the hearsay testimony and that the trial court though admitting it with reservations to strike it unless connected up, did not strike it when the connection failed. It is defendant's contention that this error aided pursuance of the legal device to circumvent ordinary rules of evidence to convict the defendant, and insists that independent evidence should be first offered of the conspiracy before these conversations were admissible. Where conspiracy can be shown only by the conduct and conversations of the alleged conspirators, it is impossible for the conspiracy first to be shown before the conversations were admitted. We think from the nature of the case, that



the trial court, clothed with discretion to do so, governed the order of proof properly. Admitting the conversations in evidence, subject to their being connected with other conduct of the alleged conspirators to make sufficient prima facie proof of conspiracy, was proper. We believe that the later testimony sufficiently connected them so as to warrant making their admission absolute. (People v. Seefeldt, 310 Ill. 441 and Ochs, et al. v. People, 124 Ill. 399).

It is next contended that the defendant was prejudiced by unfair conduct and inflammatory argument of the prosecution. During a discussion an objection to a question whether the complaining witness was being paid by her employer, the prosecution said it would like to know on what theory the answer should be given. Defense attorney answered, "On the theory that you fellows have been laying for her up there". The prosecution answered, "The chances are we paid for the abortion here too." It is difficult to say how far rejoinders to a remark such as the defendant's attorney should extend. The next incident referred to was when complaining witness testified on cross examination that she thought she came out defendant's office building by a certain entrance. Attorney for the defendant said, "I am not asking you what you think, you either know or you don't know." The prosecution replied, "She can give the best she knows. After all, she just got through having an operation under gas". A motion to withdraw a juror was overruled. There was evidence that a gas contraption was in the office where the alleged abortion was performed. The third incident occurred during the cross examination of defendant as to the history of his medical practice. Defendant asked whether he could elaborate on his license. The prosecution answered, "Doctor, I am not afraid of you". Upon objection of the defendant's attorney the prosecution said, "The doctor asked if I was afraid of him and



I said, 'No, why should I be'." The latter statement of the prosecution was unfair because it was not true. The doctor did not ask that, he asked whether he could elaborate on his licence. The first remark that the prosecutor was not afraid of the doctor may have been harmless or harmful, depending on his voice, inflection and attitude. The next incidents referred to are the argument to which we have already referred. This argument was prejudicial, not because it was not based on evidence, or was not reasonable inference, but because defendant was not permitted to give evidence of a contrary nature on which his attorney could argue and draw inferences. The incidents other than the argument were not in our view harmful. The trial court in a wise guidance of the trial, by appropriate instructions to disregard unfair and inflammatory remarks, can give suitable protection to one accused of crime, allowing for reasonable zeal. The trial court, especially in criminal cases, and especially in the type of case, subject of this indictment, should be careful to keep opposing counsel from engaging in conduct which prejudices the rights of defendants.

After a consideration of the error assigned, we are of the opinion that the defendant was prejudiced by the refusal of the court to permit a full cross examination of the complaining witness, by the refusal of the court to permit the defendant to introduce evidence of the reason for his absence from the City April 30 to the middle of May, and by the argument made by the prosecutor based upon testimony that defendant was absent from the City. Since this indictment was for conspiracy and the only testimony of conspiracy was by the complaining witness, we feel that these errors deprived defendant of a fair trial and that the case should be retried.

We have not considered questions relating to the quantum of the evidence.

For the reasons given the judgment is accordingly reversed and the case is remanded for a new trial in accordance with the views herein expressed.

REVERSED AND REMANDED WITH DIRECTIONS.

BURKE, P.J. AND LUPE, J. CONCUR.



✓43295

JULIUS ZWILG,

Appellant,

v.

L. A. GOLDBREICH,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

3231A

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a forcible entry and detainer action filed August 22, 1944 for possession of office and basement space and the north half of the rear of a store premises at 706 S. Wells Street, Chicago. Judgment was for defendant and plaintiff appeals.

The decision of the trial court was upon a question of law since all the facts were stipulated.

Plaintiff sublet to defendant the parts of the premises mentioned, for a term beginning September 1, 1943 and ending May 31, 1945, the termination date of plaintiff's main lease. The balance of the store premises, except for a part not involved here, was retained by plaintiff under his lease. According to an agreed sketch or plat, the premises are divided into front and rear by a partition, and the front is divided by a partition into north and south. The north part of the front is used jointly by the parties, defendant having a small desk space. A passageway leads from the north front to the entire rear premises where, following execution of the sub-lease, defendant and plaintiff occupied the north and south halves respectively. There is no physical division of the rear premises. A door which slides laterally leads to the alley from defendant's side of the premises.

An elevator shaft is located at the rear of plaintiff's side of the premises, with vertical sliding doors in front and back, opening onto the floor and alley, respectively. Both parties are in the machinery business and the dispute between them arises out of the denial by defendant to plaintiff of the use of the alley door on defendant's side. Plaintiff made no express reservation of the right. The parties agree that an easement may be created by implication where unity of possession of the property is divided by lease. The issue is whether under the circumstances here, plaintiff had an implied easement for movement of machinery to and from his side of the premises through the rear door on defendant's side.

To establish an implied easement, plaintiff had the burden (Traylor v. Parkinson, 355 Ill. 476) of proving the separation of his estate by the sublease; his previous use of the door on defendant's side, so manifest to defendant that the latter should have considered it a permanent use; and that the use was necessary to the beneficial enjoyment of plaintiff's reserved estate. Fels v. Arends, 328 Ill. 38; Van Patten v. Loof, 349 Ill. 483; Traylor v. Parkinson, 355 Ill. 476; and Liberty National Bank v. Lux, 378 Ill. 329. If these elements exist, defendant's estate is burdened by the implied easement. Fels v. Arends, 328 Ill. 38.

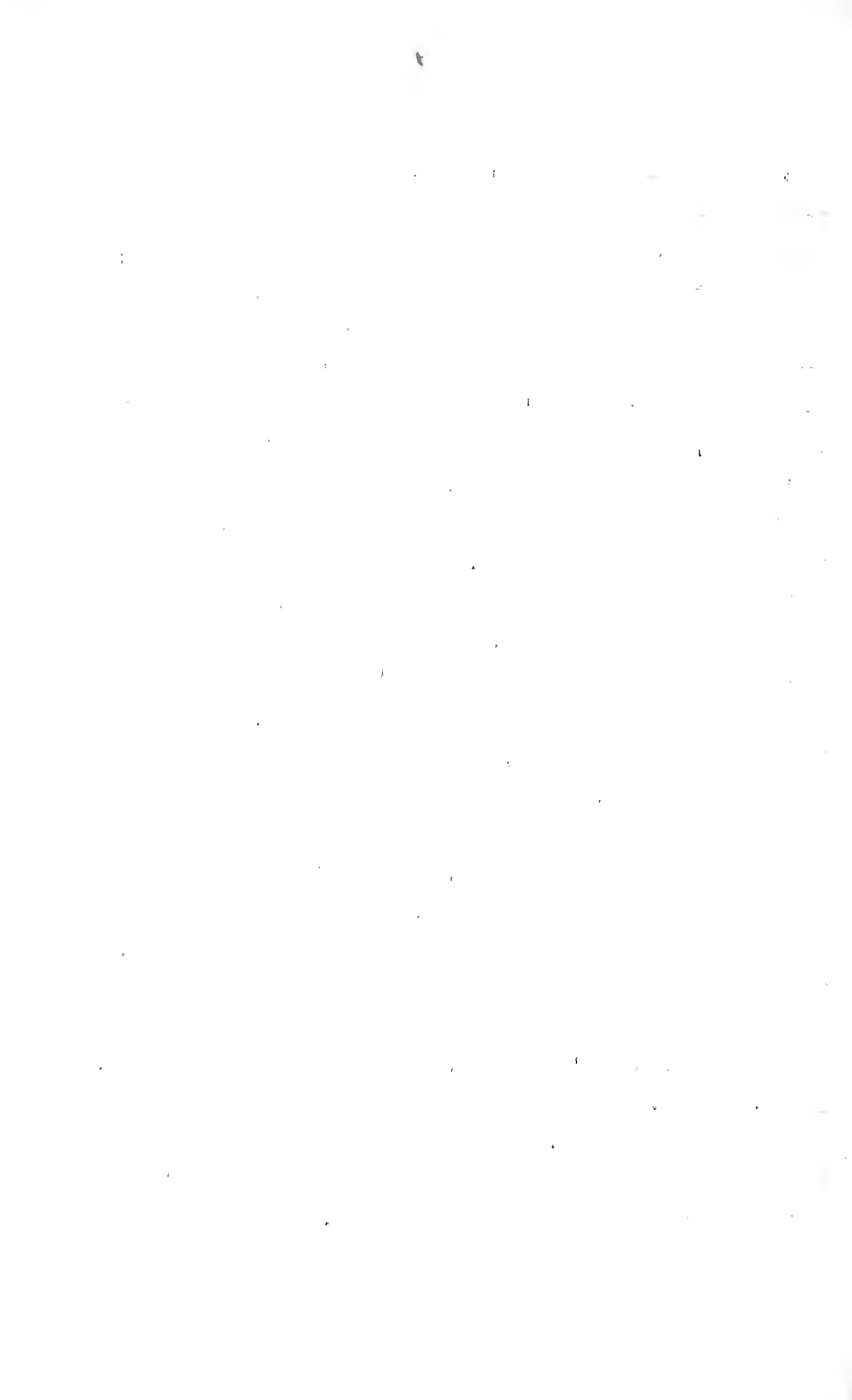
The fact that the parties stipulated does not relieve plaintiff of the burden of proof. The facts necessary to prove the requisite elements must appear in the stipulation. Plaintiff is entitled to the same inferences from the stipulated facts as would be drawn were the facts presented in the usual manner. There is no question that the separation of plaintiff's estate is shown. The stipulation recites that since the making of the lease, defendant has contended plaintiff is not entitled to, and has denied him, use

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of the rear door on defendant's side; that both plaintiff and defendant in the operation of their businesses have occasion to move heavy machinery in and out of their respective sides of the premises; that from the making of the lease to December 1943, plaintiff moved no machinery "into or out of the premises"; that machinery can be moved through the elevator door to plaintiff's premises; and that the rear door on defendant's side measures 72 inches wide and 96 inches high, while the elevator door on plaintiff's side measures 70 inches wide and 84 inches high, as a result of which "certain machinery which could be moved through said rear door, can not be moved through the elevator door."

We cannot find in the facts stipulated, nor in any legally drawable inferences therefrom, that there was any previous use by plaintiff of the rear door on defendant's side so manifest that the latter should have recognized the use as permanent. The only inference is to the contrary, for defendant has continuously refused to recognize the use, and the stipulation shows plaintiff has not moved machinery through the door since the lease was made and there is no word of any use theretofore. We cannot find either, any fact nor draw any legal inference to show, that the use is necessary to the beneficial enjoyment of the premises reserved by plaintiff. There is no showing and we cannot reasonably infer that the "certain machinery" which cannot be moved through the rear elevator door was necessary to plaintiff's business. Plaintiff relies on Martin v. Murphy, 221 Ill. 632 as the leading case in Illinois upon the rule which he says favors him. It is sufficient to point out in that case that the evidence showed a long previous use and defendant's purchase of the property with knowledge of the burden.



Plaintiff contends that a further right of access arises from Chapter 50-28 of the Municipal Code of Chicago requiring two outside exits for premises such as these. He says that unless he can use defendant's rear door, there is no compliance with the ordinance. The stipulation does not contain facts to bear out the contention, and the bare plat is not helpful for that purpose. On the contrary, in addition to a passage from the rear to the north front of the premises and to the front door, another door is shown by the plat at the rear of plaintiff's premises south of the elevator.

We need consider no other point and for the reasons herein given the judgment is affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J. AND LUPE, J. CONCUR.

Abstract

STATE OF ILLINOIS

' APPELLATE COURT

February Term, A.D. 1945

Gen. No. 9457

Agenda No. 7

Aldo O. Mondin, by Virginia
Mondin, his Guardian,
Plaintiff-Appellant,)

-vs-)

Decatur Cartage Co., a
Corporation, and Mary Scariot,
Administrator of the Estate
of George John Scariot,
deceased,)
Defendants-Appellees.)

Appeal from the

Circuit Court of

Montgomery County,
Illinois.

Dady, P. J.

This is a personal injury suit brought by Aldo O. Mondin, a minor, by his next friend, against Decatur Cartage Company, a corporation, and Mary Scariot, as administrator of the Estate of George John Scariot, deceased. The trial court entered judgment in favor of the defendants on a verdict of the jury which found both defendants not guilty. The plaintiff appeals.

The complaint charged that the Cartage Company negligently drove its truck, without any lights, to the left side of the center line of the pavement and ~~caused it to~~ thereby collide with an automobile in which the plaintiff was riding as a guest, proceeding in the opposite direction.

The complaint also charged that the plaintiff was also injured through the wilful and wanton misconduct of George John Scariot, now deceased, who was driving the automobile in which the plaintiff was riding as a guest at the time of the accident. The misconduct charged was that Scariot wantonly and wilfully drove such automobile

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at a dangerous and reckless rate of speed without sufficient brakes and without applying his brakes or sounding his horn when he saw the truck approaching from the opposite direction, and without keeping a proper lookout.

The answer of the Cartage Company denied all charges of negligence, and the answer of the administrator denied all charges of wilful and wanton misconduct.

The accident occurred about 12:30 A. M. on November 2, 1942, on Route 16, and a short distance from the home of plaintiff. Route 16 was paved with concrete, the concrete being 18 feet in width, ~~xxx~~ with a black line in the center. The accident happened between two curves in the road. Between the two curves the road ran straight for about 2000 feet. The automobile, which was a Chevrolet Sedan, was being driven northerly by Scariot, and the truck, made up of a tractor and trailer, was being driven southerly. The automobile and truck collided, resulting in the death of Scariot and in quite severe injuries to the plaintiff.

The plaintiff and Scariot were neighbors. The plaintiff was aged sixteen years and Scariot was aged about twenty years. Scariot was driving and the plaintiff was riding beside him as his guest.

There were only two eye witnesses to the accident, viz., the plaintiff and one Adrian Carter, who was the driver of the truck.

The plaintiff testified that he and the deceased started driving home about 12:00 or 12:20 A. M., that the deceased was driving about 40 or 50 miles per hour when the witness asked the deceased to slow down a little, that after driving through a curve about a mile and a half south of the place of the accident, the deceased

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started driving about 45 or 50 miles per hour, that the deceased slowed down after the witness checked him and then started going faster again, that the witness again asked the deceased to slow down, but the deceased said everything would be all right, that just before the accident they went around a sharp curve at a speed of about 55 or 60 miles per hour, that at the northerly end of the curve the plaintiff saw the truck approaching and about 300 feet distant, that the truck was then on the easterly side of the center black line of the road and traveling almost in the center of the road at about the same speed as the automobile was then traveling, that the automobile ran off the concrete and onto the shoulder on his right as it came out of the curve in the road, and that the truck and the automobile collided with each other at a time when the right or easterly wheels of the automobile were on the right or easterly shoulder, and at a time when the automobile was traveling at a speed of from 50 to 55 miles per hour.

Carter, the driver of the truck, testified that while driving southerly on the westerly side of the pavement, at a speed of about 30 miles per hour, he first saw the automobile approaching when it was about 300 feet distant, that the automobile was then coming around a curve at a speed of about 60 miles per hour; that the curve was about 1000 feet in length and its shoulder was banked; that his truck and the automobile each maintained about the same rates of speed, that he could not see the automobile slacken its speed at any time, that as the automobile left the curve all of its wheels were on the concrete; that the automobile then proceeded about 100 feet northerly with its left wheels on the concrete and its right wheels on the shoulder of the road, that he, Carter,

7. The following information was obtained from the above mentioned sources:

court properly held such witness incompetent as against the administrator, but permitted him to testify as against the cartage company.

In addition to finding both defendants not guilty, the jury answered a special interrogatory by saying that the deceased Scariot was not guilty of wilful and wanton misconduct.

After a careful consideration of all of the competent testimony, we cannot say that the jury was not justified in returning such verdict and making such finding, and cannot say that the verdict is against the manifest weight of the evidence. (Clarke v. Storohak, 384 Ill. 564; Streeter v. Humrichouse, 357 Ill. 334).

Appellant next contends that the court erred in permitting Mary Scariot, who was the defendant administrator and the mother of the deceased, to testify as to skid marks which she saw after the accident. There is no merit to this contention. (See Barnes v. Earle, 275 Ill. 381; Steele v. Clark, 77 Ill. 471).

It is contended that the court erred in refusing to permit the plaintiff to testify to the same things and circumstances to which Mary Scariot testified. The record as presented presents no such question for us to pass upon.

Appellant contends that the court erred in refusing to give his submitted instruction numbered eight. It is our opinion that this instruction was fully covered by his given instruction numbered six.

It is next contended that the evidence shows that the Cartage Company was guilty of acts contributing to cause appellant's injuries. Whether or not the Cartage Company was guilty of such acts was a question of fact. We cannot say that the jury was not justified in believing the testimony of Carter, who was the driver

of the truck. If the jury believed such testimony, and they evidently did, then in our opinion the jury was justified in finding the Cartage Company not guilty.

Appellant's next and last contention is that the court erred in giving the Cartage Company's instruction numbered one, which told the jury that in order to obtain a verdict against such company the plaintiff must prove that the acts of negligence of such company, if any, must be the "direct and proximate" cause of the injury. The words "direct and proximate" are particularly complained of. It is our opinion that we are not required to pass upon whether this instruction was technically correct, for the reason that plaintiff's given instructions numbered 1 and 2 told the jury that if they found the Cartage Company guilty of any negligence which proximately contributed to the collision in question then they should find the Cartage Company guilty.

It is our opinion that the plaintiff was given a fair trial and that no reversible error is shown.

The judgment of the trial court is affirmed.

Affirmed.

Abstract

Agenda number 6.

Fig. 6.

HERALD HIRAM CUMMINGS,
Plaintiff-Appellee
-vs-
FRED STELLA and GLENN STELLA,
partners doing business under
the firm name of Stella Baking
Company,
Defendant^s-Appellants.

HAYES, J.:

This is an appeal from a judgment recovered by the plaintiff against the defendants in the sum of \$164.77, in the Circuit Court of Vermilion County. The plaintiff had been a former employee of the defendants' who were engaged in the Bakery business in the city of Danville. Plaintiff ceased working for defendants on February 14, 1939, but had worked for them several years prior to that time. Plaintiff claimed that he worked in the capacity of a dough-mixer and stated that when he first went to work for them they were not a union shop and he was not a member of a union, but that shortly thereafter they entered into a contract with the union, and thereupon the plaintiff joined the union. The union contract provided for a fixed scale for day work and night work, and for a check-off of union dues. Plaintiff contended in his testimony that they never paid him the full amount of his weekly wages up

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until shortly before ceasing his employment; that he quarreled with them about his salary, and they promised they would straighten it out, but never did. Plaintiff did not file his suit until January 28, 1943 which was slightly less than four years after he had severed his relationship with them. The defendants set up, as an affirmative defense, the five-year Statute of Limitations. The case was tried before a jury and they returned a verdict of two hundred dollars. Plaintiff's claim was for two thousand dollars, but the major portion of it was barred by the five-year statute. The Court required a remittitur bringing down plaintiff's allowance to \$164.77. The defendant bases his appeal on the claim that the complaint failed to prove his case by a preponderance of the evidence; that the verdict is against the manifest weight of the evidence, and alleges error in the admission of evidence and the failure of the court to allow defendants' motion for judgment, notwithstanding the verdict. Both the defendants, being partners, denied categorically that they had failed to pay the plaintiff his full wages each week during the time that he worked for them, and denied that they owe him anything, and set out that they put him to work in the first instance as an accommodation to his wife, and that he went in as a helper and not as a regular dough-mixer and that they used him as a utility man.

It appears from the evidence that the plaintiff was a man fairly well advanced in years, and when he was pressed as to why he didn't make an issue of his being short in his pay he replied that he did argue about it but he didn't want to lose his job; that work was scarce and times were hard.

The proofs on each side are not too satisfactory although the record discloses that in the year 1937 the defen-

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dants entered into a union contract which was renewed in 1938 and 1939. Defendants were indefinite and evasive in their testimony about this contract, or about what the regular scale was, and it is significant that the last five or six weeks before the plaintiff ceased working he was paid in full under the union scale, and a receipt was taken from him by the defendants, but just prior to this time no receipts were ever taken from the plaintiff.

The errors assigned and pressed herein are based purely on a question of fact and from a close examination of the abstract we are not able to say the jury was wrong. They were the trier of the facts and there was not such a clear demarcation on the proofs that a court of review can say the jury found against the manifest weight of the evidence.

Although plaintiff is contradicted by the defendants, there is evidence that the union contract was entered into by the defendants within the five-year statute and that plaintiff's statement showed his weekly pay did not amount to as much as the union contract called for. We do not think the court was in error in admitting the secondary proof on the contents of this contract, as preliminary proof was made that notice had been served on the defendants, who were parties to the contract to produce the original contract. Counsel for the defendant stated in open court that they did not have it in their possession and it appears from the record, although not in the abstract, that defendants' objection to the admission of this contract was finally withdrawn. Defendants in their brief, cite a number of cases holding that a plaintiff cannot recover where the

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only evidence is that of the plaintiff without any corroboration and is contradicted by the defendant,--but that is not the situation here. Although plaintiff is contradicted by the defendants there is very strong evidence to show the union contract was entered into by the defendants for the years 1937, 1938 and 1939; that it was for the benefit of the plaintiff, and it definitely fixed the wage scale. The defendants failed to meet this proof stating that they did not think they were in the union at that time. The authorities cited do not apply to this record as it is now presented to us.

The law does not encourage the prosecution of stale claims but does permit suit to be brought on oral contracts within five years, and the plaintiff filed his suit within this time.

The error relied upon by appellants for reversal of this judgment is not of such a nature as to cause a reversal.

For the reasons herein pointed out judgment of the Circuit Court of Vermilion County is affirmed.

JUDGMENT AFFIRMED.

Abstract

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

Gen. No. 9448

Agenda No. 2

GRACE L. SEABORN and DELMA MINK,
substituted for R. E. SEABORN,
deceased Plaintiff,

Plaintiffs-Appellants

v.

TOWN OF HADLEY, PIKE COUNTY,
ILLINOIS.

Defendant-Appellee.

Appeal from County
Court of Pike County.

RIESS, J.:

Plaintiffs have appealed to this Court from a judgment of the County Court of Pike County in favor of Defendant-Appellee Town of Hadley. The case was tried de novo by a jury upon appeal from a Justice of the Peace Court and at the close of all the evidence, on Defendant's motion, the jury was peremptorily instructed to find a verdict for the Defendant. Upon return of the verdict and denial of Plaintiffs' motion for a new trial, a judgment was entered in favor of the Defendant in bar of suit and for costs. The original suit was filed by R. E. Seaborn, predicated upon an alleged oral contract between him and the Highway Commissioner of the Town of Hadley. Upon Seaborn's subsequent death, his widow and daughter were substituted as Plaintiffs.

Error is assigned in the giving of the peremptory instruction; in denying Plaintiffs' motion for a new trial and in entering judgment on the directed verdict in favor of the Defendant.

Briefly stated, the evidence tended to show that in 1938, conversations were had between R. E. Seaborn and Ray Likes, the County Superintendent of Highways of Pike County, concerning a proposed change in the "State Aid" highway. A sharp turn in the highway maintained by the County was located near a hill top which created a more or less hazardous condition, sought to be eliminated by the County Highway Superintendent and County Board by procuring an additional strip of right-of-way from Kyle Seaborn, adjoining landowner, for use in

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straightening the highway at the point in question. The change involved the repair or rebuilding of wire fencing of two landowners along the line of the proposed alteration in the right-of-way. Plaintiff's brother, Kyle Seaborn, dedicated a small triangular strip of land to the State for the right-of-way change. The labor incident to removal and rebuilding of the fences was to be done by a "W.P.A. Project" if procurable and otherwise by the landowner. The County refused to furnish or pay for the fence or for the dedicated right-of-way. No written record nor documentary evidence of this change and project appears in the record. Following a general conversation with the County Superintendent of Highways, it appears that R. E. Seaborn, since deceased, and Marion Richey, the then Highway Commissioner of Hadley township, orally arranged in somewhat vague terms that upon dedication of the triangular corner of the land of Kyle Seaborn, brother of R. E. Seaborn, for the purpose of straightening the road in question, the line fence of Kyle Seaborn was to be repaired or new fencing material furnished as damages for the right-of-way tract dedicated by him. Kyle Seaborn testified (Rec. p.26) among other statements, that "I was to get that fence for the right-of-way." That Davidson had said (Rec. p. 25) that they had no money to pay for it. That (Rec.p.26) "they were supposed to levy that the following year." After the dedication, the change in the public highway was made by the County Board and Highway Superintendent, followed by it's continued use and travel as a State Aid highway by the general public, both within and beyond the Township. Commissioner Richey, with whom the above oral conversation was first had, was succeeded in office in April 1939, by one Frank Davidson. In the fall of 1939, R. E. Seaborn requested Davidson to measure the fencing required along the new highway strip obtained from Kyle Seaborn. Davidson was then informed by R. E. Seaborn of the alleged oral agreement with the predecessor of Davidson concerning the fencing. After a conversation between Seaborn, Richey and Davidson, it appears that Davidson stated that he would do everything in his power to carry out the oral agreement, if it was lawful; that at the instance of R. E. Seaborn, the

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measurement was made of the length in rods of the required fencing which was set down on a paper memoranda signed by Davidson's name with no official designation; that R. E. Seaborn purchased and paid \$140.40 for the wire fencing but the same was never delivered to Kyle Seaborn nor to the Commissioner nor erected along the right-of-way for fence purposes; that there was no money on hand in the district fund to pay for the same at the time of these conversations and no levy was then or thereafter made for the purpose of paying damages or compensations for right-of-way purposes involving the fencing or change in the highway. It further appears that at the annual town meeting in the spring of 1940, the matter of the claim of R. E. Seaborn for the fence in question, was orally brought to the attention of the Town Board and electors present but no action was taken nor was any record made concerning the claim. By stipulation of the parties, copies of the general tax levies for Township road and bridge purposes for the years 1937 to 1941, inclusive, were admitted in evidence. The official minutes and records of the Highway Commissioner and Town Board and the itemized annual tax levies for road and bridge funds are entirely barren of any provision for or reference to damages for right-of-way purposes. Kyle Seaborn, for the fencing of whose land in payment for the right-of-way dedication, the purchase was allegedly made, is not a party to this suit and does not seek to recover herein, but the suit was filed by R. E. Seaborn the purchaser of the fencing and is prosecuted by his widow and heir. The fencing in question was procured for use along a highway maintained by the County and not by the Town, which had no jurisdiction over its improvement, repair or maintenance as a Township or district road.

It was contended by Appellee that no prima facie case had been made by the Plaintiffs-Appellants against the Town of Hadley; that the highway in question appears from the record to have been a "State Aid Road" over which the township supervisors had no jurisdiction; that there was no record of any contract, arrangement, proceeding or other official action taken by the Highway Commissioner

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or Town Board or appearing upon any record or minutes of said Highway Commissioner or of said Town of Hadley and that there had been no action by authorities providing for, agreeing upon or arranging for the payment or tax levy of damages for such change or alteration of the public highway, and that therefore no legal liability existed between the parties to this suit for the payment of Plaintiffs' demand.

Section 58 of Chapter 121 of the Roads and Bridges Act, Illinois Bar Statute 1943, provides in substance that when damages have been agreed upon, allowed or awarded for laying out, widening, altering or vacating roads, or for payments for right-of-way in aiding the State in the construction of the roads, the amount of such damages shall be included in the next succeeding tax levy provided for in Section 56 of the Act, in addition to the maximum levy for road and bridge purposes authorized under Section 56, and when collected, shall constitute and be held by the treasurer of the road and bridge fund as a separate fund to be paid to the parties entitled to receive the same. The Highway Commissioner shall at the time separately specify in such certificate of tax levy the amount necessary to be raised by taxation for the purpose of paying such damages and upon approval thereof by the County Board, the County Clerk shall extend the same against taxable property of the town or district. It appeared that no attempt whatever was made to comply with the foregoing provisions of the Statute.

It has been frequently held that no tax can be levied to cover damages for laying out, widening, altering or vacating roads unless the damages have been agreed upon, allowed or awarded to the property owner or owners and the record of the Highway Commissioner must show that the damages have been agreed upon, allowed or awarded to the owners for some one or more of such purposes. ^{ex rel. Smith} People v. Chicago, ^{ex rel. Puntney} Indiana and Southern R.R.Co., 265 Ill. 622, 107 N.E. 229; People v. ^{ex rel. Parks} C.C. & St. L. Ry.Co., 281 Ill. 152, 118 N.E. 1; People v. ^{Chicago} C. & E. I. R.R.Co., 281 Ill. 177, 118 N.E. 2. Any attempt to levy taxes for the purpose of paying damages for laying out, widening or vacating roads without the necessary record showing an agreement upon such

damages, would be void. ^{ex rel. Bingham} People _Λ v. C _Λ ^{Chicago} B. & Q. Ry Co., 252 Ill. 482, 96 N. E. 839.

A Highway Commissioner is a statutory officer and can exercise only such powers as are conferred upon him by statute. (^{ex rel. Road District No. 5} People _Λ v. Hedges, 289 Ill. 378, 124 N.E. 620; Townsend v. Gash 267 id. 578, 108 N.E. 744.) It is the duty of those dealing with municipal corporations to take notice of statutory limitations on their municipal power to contract, as well as specific statutory provisions governing the letting of such contracts and one dealing with public officers who derive their powers from statutory enactments is bound to take notice of the law relative to such officers and their power to act. Folkers et al., v. Butzer, et al., 294 Ill. ^{App.} 1, 13 N.E. (2d) 624. "Everyone is presumed to know the extent of the powers of a municipal corporation, and it cannot be estopped to aver its incapacity, which would amount to conferring power to do unauthorized acts simply because it has done them and received the consideration stipulated for." DeKam v. City of Streator, 316 Ill. 123(137); 146 N.E. 550, and citations therein. This rule was applied in the recent cases of O'Neill Co., v. Coon Run Drainage & Levee District, 319 Ill. App. 324, 49 N. E. (2d) 283 and Bituminous Casualty Corp., v. City of Virginia, 314 Ill. App. 238, 41 N.E. (2d) 342. In the latter case, we held that the Plaintiff is presumed to know that a city can only act through its council and at a regular or called session, and in the case of O'Neill Co., v. Coon Run Drainage & Levee District, supra, we held the same rule to apply to official action by a Board of Drainage Commissioners. The rule applies with equal force when statutory provisions and requirements governing the official action of Town Boards and Highway Commissioners relate to the payment of compensation, whether in money or in property, for right-of-way purposes.

A Commissioner of Highways is powerless to incur an indebtedness in excess of the money in the treasury unless a tax levy has been duly made to discharge it. Commissioners of Highways, v. Newell, 80 Ill. 587; Sullivan v. Commissioners of Highways, 114 id. 262, 29 N.E. 688. There must be sufficient money on hand to pay the

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indebtedness created by the contract, or the tax levy must have been made and the contract must have been within the scope of the Commissioner's power or authority under the statute. American Mexican Refining Co., v. Wetzel, 350 Ill. 575, 183 N.E. 593. The cases cited by Appellants are inapplicable to the facts presented by this record. Moreover, the dedication of the land for which fencing was to be furnished as compensation was made to the State and not to the town or district which exercised no control over the State of State Aid highway systems, and the highway was used by the public in general.

We have carefully examined and read the record, briefs and abstracts herein, and from this record we can find no facts which would constitute prima facie proof of a cause of action *based upon any contract, statutory provisions or in quantum meruit* against the Defendant, under the law and the evidence.

A peremptory instruction to find the issues in favor of the Defendant should be given if it appears from the evidence and all legitimate inferences arising therefrom that the same is insufficient in law to sustain a verdict for the Plaintiff. Pullman Palace Car Company v. Laack, 143 Ill. 24 2.

The mandatory instruction for a verdict in favor of the Defendant was properly given and the Court was not in error in entering judgment in favor of Defendant. Finding no reversible error in the record, the judgment of the Trial Court is affirmed.

JUDGMENT AFFIRMED.

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

February Term, A. D. 1945

Term No. 4303

Agenda No. 1.

P. T. CHAPMAN, Administrator of
the Estate of Harold B. Walker,
Deceased, and P. T. CHAPMAN,
Administrator of the Estate of
Elmer J. Rhonemus, Deceased,
Plaintiff-Appellee,
vs.
BRUTON INCORPORATED, a Corpora-
tion, and JACOB S. BRUTON and
FRANK WALKER,
Defendants-Appellants.

Appeal from the
Circuit Court of
Johnson County,
Illinois.

BRISTOW, P. J.

P. T. Chapman, as Administrator of the Estate of Harold B. Walker, deceased, and as Administrator of the Estate of Elmer J. Rhonemus, deceased, instituted suit in the Circuit Court of Johnson County, Illinois, against Bruton Incorporated, a Corporation, Jacob S. Bruton and Frank Walker for recovery of damages for the death of said decedents resulting from a collision between a truck and a Chevrolet coupe, in Johnson County, Illinois. Judgment against defendants was entered upon a verdict of the jury in favor of the administrator of each of said estates, in the amount of \$8,000.00. From these two judgments appeal has been taken by the defendants to this court.

The collision occurred on the evening of January 2, 1942 on a hill called New Burnside Hill at a point about 200 feet downhill north from the crest. It was a very steep hill about half a mile in length.

A large G.M.C. truck van loaded with furniture and a horse and weighing about 19,000 pounds was proceeding on the 24 foot wide paved highway in a southerly direction upward toward the crest of this hill. Defendant Bruton, the owner of said truck and president of Bruton Incorporated, was riding in the cab of the truck beside Frank Walker who was driving the truck. Bruton was engaged in the transportation business by truck.

Harold B. Walker and Elmer Rhonemus, who were soldiers, and a third soldier whose name and residence seems to be unknown to any of the parties, were riding in a 1935 Chevrolet coupe on this highway northward and downward to the point of collision. After the collision, Harold B. Walker was found under the steering wheel of the coupe, and to his right on the floor board, Elmer Rhonemus was found. The automobile caught fire, and Harold Walker and Elmer Rhonemus were burned to death. The third soldier was taken from the coupe alive and to a hospital. As far as the record shows, that was the last known of him. It is not shown whether this soldier had been asleep or awake before or at the time of the collision or whether he observed any part of it.

About a half minute before the collision, which made a very loud noise, a farmer had heard a car passing about a quarter of a mile from the place where this collision occurred. Shortly after the collision a number of people gathered at the scene of the accident, and these witnesses described at length the surroundings immediately after the collision. The G.M.C. truck was lying almost square across the pavement on its right side with its top downhill. The rear end of the truck was extending six to eight feet east of the pavement upon the earth shoulder, and the front end of the truck extended to a point three feet east of the west edge of the pavement. The coupe was standing eight to ten feet

south of the truck on the north traffic lane and east of the center line of the pavement with its rear right wheel in or at the edge of the gutter. It was headed north. Witnesses also described in detail the numerous and severely injured parts of the truck and coupe as caused by the collision. On the west side of the pavement there was ice at a point fifteen or twenty feet north of the point of collision.

No witness testified to the occurrence of the accident. The case rested upon circumstantial evidence. On the objection of incompetency, under the Evidence Act, Bruton was not permitted to testify upon his own behalf and that of the defendants as to the occurrences just before and at the time of the collision, but did testify as to matters that occurred thereafter. The soldier who was taken to the hospital did not appear as a witness, nor was his absence explained or accounted for by either side.

Evidence was introduced showing that both Harold B. Walker and Elmer J. Rhonemus had been farm boys, were 23 and 21 years of age respectively, and that they had worked without pay on their parents' farms in Ohio before their induction into the army. They were each shown to have been survived by parents, brothers and sisters. The evidence showed that each was sober, industrious, hardworking and home-loving; and that they drove automobiles and tractors. For about two years, one had been sending about \$25.00 a month to his home for the support of his family.

The several counts of the complaint charge negligence of the defendants in various particulars. Negligence was charged in failing to keep proper lookout for the coupe; in driving at a speed which was not reasonable and proper; for driving without proper headlights; and for driving contrary to the law and certain provisions of the Illinois Statutes. Defendants' answers deny the

charges, and set up a special defense charging that the collision was directly due to the carelessness of Harold B. Walker driving the coupe without proper lookout for other vehicles; that Harold B. Walker operated the coupe on the west side of the pavement and at a speed that was not reasonable and proper and in violation of the Statute. The special defense further averred that Harold B. Walker and Elmer J. Rhonemus were engaged in a joint mission, and that the negligence of Harold B. Walker was chargeable against Elmer J. Rhonemus.

Appellants make and argue several points for reversal of judgment. The most important of which are that the negligence of the defendants and due care of the decedents are not proven; that the offered testimony of Jacob S. Bruton as to the occurrences just before and at the time of the collision should have been admitted; that the court erred in giving instructions for plaintiffs and in refusing instructions for defendants; and that the verdicts are excessive.

Whether plaintiff has proven his charges of negligence and whether the driver and occupants of the coupe were exercising ordinary care for their own safety and safety of others were questions of fact for the jury. We have carefully read over all the evidence, and are not at all persuaded that the verdict of the jury is manifestly against the weight of the evidence. It is not within our province to weigh the evidence or to disturb the verdict of the jury unless we should feel that it is against the manifest weight of the evidence. Adamson vs. Magnelia, 286 Ill. App. 412, 421; Fricke vs. St. Louis Bridge Co., 309 Ill. App. 279, 285; Emge vs. Illinois Cent. Railroad Co., 297 Ill. App. 344, 347. Where there is no eye witness, the jury may presume due care on the part of the deceased; Illinois Central Railroad Co. vs. Nowicki, 148

Ill. 29, 34. Due care may be inferred by the jury from circumstances appearing in the proof. Chicago & Eastern Illinois Railroad Co. vs. Beaver, 199 Ill. 34, 36; Adams vs. C. C. C. & St. L. Railroad Co., 243 Ill., 191, 195.

In the absence of an eye witness, plaintiff is only required to provide the highest type of evidence available. Illinois Central Railroad Co. vs. Prickett, 210 Ill. 140. Due care may be presumed by facts upon which the presumption may be based. Blumb vs. Getz, 366 Ill. 273. Proof that a deceased was by habits sober, industrious, possessed of his faculties, with the instinct of self-preservation, may be sufficient to establish due care. C. B. & Q. Railroad Co. vs. Gunderson, 174 Ill. 495, 498; Illinois Central Railroad Co. vs. Nowicki, 148 Ill. 29, 34. Negligence and due care may be proved by circumstances. U. S. Brewing Co. vs. Stoltenberg, 211 Ill. 531, 535; The North Chicago Street Railroad Co. vs. Rodert, 203 Ill. 413; Slack vs. Harris, 200 Ill. 96. Trial court did not err in refusing to take the case from the jury and in refusing to grant a new trial or in denying defendants' motion for judgment notwithstanding the verdict.

Jacob S. Bruton is one of the defendants. He was examined prior to the trial by the plaintiff under Section 60 of the Illinois Civil Practice Act. Appellants contend for that reason that his disqualification under Sections 1 and 2 of the Evidence Act was removed. We do not accede to such contention, and believe that the trial court did not err in refusing to permit him to testify in his own behalf in regard to matters just before and during the collision. Garrus vs. Davis, 234 Ill. 326, 330; Blumb vs. Getz, 294 Ill. App. 432.

To take advantage of the existence of an eye witness, if none has been produced by the plaintiff, the defendant may produce him

or tender his name and address to the plaintiff. This was not done. Young vs. Patrick, 323 Ill. 200, 202; Moore vs. Bloomington, Decatur and Champaign Railroad Co. 295 Ill. 63, 65. In this case, the name and address of this soldier who was taken to a hospital is not shown by the record to have been tendered to the plaintiff, nor can we find any account explaining his absence or whether he may have been asleep or may not have been observant of the occasion of the collision.

We do not think that the court erred in refusing to permit the defendant Jacob S. Bruton to testify in his own behalf in regard to the occurrences of this accident.

Complaint is made to the giving of several instructions on behalf of the plaintiff. The chief objections pointed out are that they referred to the complaint for the negligence charge and used the words "proximate cause" without defining the terms and the issues. In a special interrogatory to the jury tendered and given on behalf of the defendants, the defendants used the words "proximate cause." This term may be understood as well as a definition of it. Fippinger vs. Glos, 190 Ill. App. 236. In several instructions tendered and given on behalf of the defendants, the jury was referred to the complaint for charges therein contained. A party complaining of alleged error which he himself has committed in instructions tendered on his behalf is not entitled to a reversal upon complaint of his adversary's instructions. Fleming vs. The Elgin, Joliet and Eastern Railway Co. 275 Ill. 486; McInturff vs. The Insurance Company of North America, 248 Ill. 92, 99. We find no reversible error because of instructions given on behalf of the plaintiff.

Defendants state that they tendered eighteen instructions. In their original brief and argument, they state and argue at

great length that the court refused to read to the jury all but three of these eighteen instructions, and pointed out errors, and cited many cases in support of such supposed error. Appellee's original brief asserts that three of the instructions were the ones refused on behalf of defendants, and that all of the other instructions were actually given and read to the jury. Appellee points out in his brief and argument that counsel for appellants had erred in preparing the original abstract, and in such assertions in their brief that fifteen instructions were refused by the court. Appellee filed on October 18, 1943 an additional abstract with his brief. The original abstract and appellants' original brief and argument were filed September 18, 1943. The additional abstract recites that, "The defendants tendered to the court to read to the jury and the court read to the jury on behalf of the defendants, the following instructions." Then follows sixteen instructions which are the identical instructions appellants' brief asserted were refused by the trial court and not read to the jury. A reference to the Record substantiates this. Appellants have filed no reply brief nor made any claim that such showing in the additional abstract of record was an incorrect statement of fact.

We therefore find no error in refusal of instructions tendered on behalf of defendants.

Appellants further contend that the verdicts were excessive. The amount of damages in such cases is the peculiar province of the jury. Many judgments of such amounts under like factual situations have been affirmed. Chicago vs. Hesing, 83 Ill. 204; B. & O. S. W. R. R. Co. vs. Then, 159 Ill. 535; Deming vs. City of Chicago 321 Ill. 341. We do not believe under the proof that the judgments were excessive. The trial court did not err in rendering judgments

upon the verdict.

We find no reversible error, and therefore the judgments are affirmed.

JUDGMENTS AFFIRMED

Abstract

FILED
MAR 5 1945
Stanley R. Brown
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT
February Term, A. D. 1945

Agenda No. 2.

Term No. 4406

PEOPLE OF THE STATE OF)	
ILLINOIS,)	
)	Error to
Defendant in Error,)	
)	Circuit Court,
vs.)	
)	White County,
CHARLES BRITT,)	
)	Illinois.
Plaintiff in Error.)	

CULBERTSON, J.

327 I.A. - 15

This is a Writ of Error, sued out in behalf of CHARLES BRITT (hereinafter called defendant) to reverse a judgment entered in the Circuit Court of White County, sentencing the defendant to six months in jail and a fine of \$300.00, upon a written plea of guilty, which was in terms to "assault with a deadly weapon with intent to do bodily injury."

Defendant had been indicted on two counts, one of which charged assault with intent to kill and murder, and the second with shooting a gun with intent to murder. Defendant pleaded not guilty to the indictment and when the cause came on for trial, by leave of Court, defendant withdrew the plea of not guilty and entered instead a written plea, as hereinabove set forth. The record refers to an admonition to the defendant as to the consequences of his plea, without showing that any specific penalty was described to the defendant. Thereupon, the Trial Judge entered judgment, as follows:

"Now, upon his plea of guilty to the crime of assault

with a deadly weapon with intent to inflict upon the person of another a bodily injury, with no provocation appearing therefor, and with circumstances showing an abandoned and malignant heart, the judgment of the Court is a fine of \$300.00 and six months at Vandalia"

In the state of the record before this Court it is apparent that the defendant in his written plea of guilty, in effect, pleaded guilty to a simple assault, for which the maximum penalty is a fine of \$100.00. The written judgment sets forth a graver crime with the addition of the words, "with no provocation therefor and with circumstances of the assault showing an abandoned and malignant heart."

The case of PEOPLE vs. ANDERS, 185 Ill. App. 343, is a case directly in point. In that case the defendant had likewise been indicted for assault with intent to kill, etc. The plea of guilty in that case was entered to "assault with intent to do bodily injury." A judgment was then entered by the Trial Judge in that case, adding words of the same character as were found in the instant case. In that case the defendant was sentenced to a year in jail. The Court, on review, reversed the conviction and stated, (page 344), "It is apparent that the plea entered by the defendant was only to an assault with intent to do bodily injury, for which the Statute provides that the punishment shall be by a fine of not less than \$3.00 nor more than \$100.00. Upon this plea he was found guilty of a crime of a higher degree than he had confessed, and the sentence of punishment was larger than justified by his plea. Under this condition of the record it is clear that such judgment and sentence were improper." Similarly, in the case before us, the judgment and sentence of the Court were clearly improper on the basis of the written plea, and such judgment will,

accordingly, be reversed with directions to the Court below to enter a judgment consistent with the written plea of record.

Reversed and remanded to the Circuit Court of White County with directions to enter judgment in accordance with the written plea of record.

Reversed and remanded,
with directions.

Abstract.

FILED

MAR 5 1945

Stanley R. Brown

CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

February Term, A. D. 1945

Term No. 4409

Agenda No. 3

LOYD HEDDEN,
Plaintiff-Appellee,
vs.
THE FARMERS MUTUAL RE-INSURANCE
CO. OF CHICAGO, ILLINOIS, a
Corporation,
Defendant-Appellant.

Appeal from the
Circuit Court of
Pope County,
Illinois.

CULBERTSON, J.

This is an appeal by the Appellant, THE FARMERS MUTUAL RE-INSURANCE CO. OF CHICAGO, ILLINOIS, a Corporation (hereinafter called defendant), from a judgment of the Circuit Court of Pope County, in favor of appellee, LOYD HEDDEN (hereinafter called plaintiff), for the sum of \$400.00, in a suit brought by the plaintiff upon a windstorm insurance policy issued to him by the defendant Company. The defense interposed was that the barn destroyed was not covered by the policy issued to plaintiff.

From the evidence in this case it appears that the plaintiff owned a farm in Section Eleven (11), Township Fourteen (14), South, Range Five (5) East, in Pope County, Illinois, upon which were several buildings, and which farm was mortgaged to the Federal Land Bank of St. Louis. It appears that plaintiff also owned a forty-acre tract of land in Section Four (4) of the same Township. This land was not included in the mortgage to the Land Bank, but did have a barn on it. On November 18, 1939 the Federal Land Bank of St. Louis notified plaintiff, by letter, that his windstorm insurance was expiring, and gave him a list of the build-

ings that it would require to be insured. Among the buildings required to be insured were two barns.

It appears from the evidence that the Company in which the plaintiff had been carrying his insurance had quit doing business in that territory, and that on November 24, 1939, the plaintiff went to Golconda to see the Agent of the defendant Company, and through him, made an application for insurance on a dwelling, two barns, and other buildings, all of which were specifically described, and the location of which buildings was given as being in Section 11. The Agent of the defendant Company contends that he prepared the application according to the information given to him by the plaintiff, and the plaintiff contends that such is not the fact, but that, on the contrary, he also applied for insurance on the barn in Section 4. The application, when signed by the plaintiff, appears to have been sent by the Agent of the defendant Company to the office of the defendant, and the policy there issued and mailed direct to the Federal Land Bank of St. Louis. It does not appear from the evidence that plaintiff herein ever saw or had possession of the policy of insurance after it was written by the defendant Company.

On the 30th day of April, 1940, the barn in Section 4 was blown down and totally destroyed, and when this loss was reported to the defendant Company, plaintiff contends that then, for the first time, he was advised that there was a mistake in the application for the policy, and that the \$400.00 of insurance which he had intended should be put upon the barn in Section 4, had been put upon the barn, number 2, in Section 11. This suit was brought at law to recover the \$400.00 insurance the plaintiff contends he had on the barn in Section 4, and which plaintiff alleges was not put upon said barn in Section 4 by reason of a

mistake.

The evidence in this case is not voluminous as there were only two witnesses testifying on the question of whether there was a mistake in the application and policy as to the barns intended to be covered and the location thereof. The plaintiff testified that it was his intention to insure the barn on the forty-acre tract as "Barn number 1" and the larger barn in Section 11 as "Barn number 2". Plaintiff further contends that he only took out \$50.00 insurance on the barn in Section 11 because he was going to have it repaired and then insure it adequately and that he hadn't been able to do this on account of bad weather, until after the storm demolished the barn on Section 4. Plaintiff further testified that he told defendant's Agent, Foreman, he didn't know the exact size of the barns on the land in Sections 11 and 4, and that defendant's agent, Foreman, told him, "That don't make any difference because I am required by my Company to go out and take the measurements of those buildings." It appears from the evidence this was never done. It does not appear from the evidence that there were two barns on the land in Section 11 of the approximate sizes set forth in the policy issued. The Agent of the defendant was called for cross-examination by the plaintiff, under Section 60 of the Practice Act, and he testified that he did not understand that he was insuring a barn in Section 4, but understood that barn number 1 in the application and policy was the large barn on the hill, and that barn number 2 was the sheepshed barn, both on the land in Section 11. A fair consideration of the evidence discloses that the plaintiff owned only two barns that approached the description of the barns mentioned in the policy, and that one of said barns was located upon Section 11, and the other was on Section 4.

This case has been tried three times by juries, and in every case the plaintiff has prevailed. On the last trial, verdict

for \$400.00 was returned by the jury and judgment has been entered thereon.

It is principally contended on this appeal that the Court committed error in not directing a verdict in favor of the defendant at the close of all the evidence, and in not allowing defendant's motions for judgment notwithstanding the verdict, or, in the alternative, for a new trial. Complaint is also made of one instruction given on behalf of the plaintiff, and it is also contended that the verdict is not supported by the law and the evidence.

As to the first contention, a motion for a directed verdict, either at the close of the testimony of the plaintiff, or at the close of all the testimony, or a motion for judgment notwithstanding the verdict, all raise the same question (MERLO vs. PUBLIC SERVICE CO. OF NORTHERN ILLINOIS, 381 Ill. 300). Such motions are in the nature of a demurrer to the evidence, and present only a question of law as to whether, when all of the evidence is considered, together with all reasonable inferences drawn therefrom, in its aspect most favorable to the plaintiff, there is evidence tending to prove any cause of action stated in the complaint. If there is, the motion should be denied, and the weight and credit to be attached to it in connection with the other facts and circumstances shown, are questions for the jury, even though upon the entire record, the evidence may preponderate against the plaintiff so that a verdict in favor of the plaintiff cannot stand when tested by a motion for a new trial (TODD vs. S. S. KRESGE CO., 384 Ill. 524; BARTOLUCCI vs. FALLETTI, 382 Ill. 168). Under a motion for a directed verdict, or for judgment notwithstanding the verdict, the Court does not weigh the evidence, and has no power to determine the weight and preponderance of conflicting testimony (MERLO vs. PUBLIC SERVICE CO. OF NORTHERN ILLINOIS, supra; MINNIS vs. FRIEND,

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

February Term, A. D. 1945

Term No. 44018

Agenda No. 5

JOHN BRADY, Administrator
of the Estate of ARTHUR
S. WATSON, Deceased,

Appellee,

vs.

ILLINOIS AGRICULTURAL
MUTUAL INSURANCE COMPANY,
a Corporation,

Appellant.

Appeal from the

Circuit Court of

Fayette County.

CULBERTSON, J.

This is an appeal from a judgment of the Circuit Court of Fayette County, for \$880.00, in favor of Plaintiff-Appellee, JOHN BRADY, Administrator of the Estate of ARTHUR S. WATSON, Deceased, (hereinafter called plaintiff), and against Defendant-Appellant, ILLINOIS AGRICULTURAL MUTUAL INSURANCE COMPANY, a Corporation (hereinafter called defendant). Motions for judgment non obstante veredicto and for a new trial were overruled, and judgment rendered on the verdict and this appeal follows.

The factual situation which gives rise to this litigation emanates from the fact that the defendant herein issued an automobile insurance policy to plaintiff's intestate, under date of June 15, 1940. A policy fee of \$8.00 and an initial cash premium of \$10.95 (which paid up the insurance for a six-months period from June 15, 1940) were paid by plaintiff's intestate. A payment in advance was required for each subsequent six-month period, and the amount

of said payment was to be determined by the defendant. The automobile of plaintiff's intestate was totally destroyed on February 2, 1943, and the value of the automobile when destroyed appears to have been \$1100.00, and under the provisions of the policy the amount recoverable on that valuation would be \$880.00. Notice of the loss was given the defendant and the defendant declined to make payment under the terms of the policy, contending that the payment due on November 30, 1943 had not been paid, and that under the terms of the policy same had been cancelled.

It appears from the evidence that the defendant had in its hands, belonging to the insured at the time of the loss, \$11.10. It also appears that the amount necessary to reinstate the policy as of February 1, 1943, amounted to \$6.91. There appears in evidence, as Plaintiff's Exhibit number 8, check issued by the defendant herein, to Arthur S. Watson, for \$11.10, which has written thereon, among other things, "Returned dividend of \$2.96 and special dividend of \$8.14 on account of cancellation of policy 95005, as of November 30, 1942." No evidence appears in the record which showed that the insured was ever required or requested by the Board of Directors of the defendant Company to pay any insurance premium that had not been paid, nor was there any evidence presented that any demand or statement for any insurance premium had been made on plaintiff during his lifetime. The defendant placed Glenn Miller on the witness-stand, and after it had been shown that he had an interest in the Company, he was not permitted to testify beyond stating that he sent a letter to the plaintiff's intestate. It does not appear that any offer was made to prove the contents of the letter before the jury, or while the case was being tried, but an offer was made to prove that Miller mailed the original of the letter to plaintiff's intestate. It appears that the contents

of the letter were offered after the jury had retired and before any motion had been made to reopen the case for the purpose of offering further evidence.

When plaintiff introduced the insurance policy sued upon, made proof of the loss, payment of the first premium, and notice of loss or waiver of the proof of notice of loss, plaintiff made a prima facie case (CONTINENTAL LIFE INS. CO. vs. ROGERS, 119 Ill. 474; HELM vs. COMMERCIAL MEN'S ASS'N, 279 Ill. 570; SCZUREK vs. AMERICAN NAT'L INS. CO., 309 Ill. App. 260).

It is also a general rule that where a mutual insurance company has in its possession sufficient funds of the member to pay dues and assessments at the time they accrue, it must apply those funds in payment thereof, and hence cannot declare a forfeiture (KERN vs. WESTERN LIFE INDEMNITY CO., 192 Ill. App. 96; LEACH vs. FEDERAL LIFE INS. CO., 296 Ill. App. 88).

Where default in payments voids or forfeits an insurance policy, such a voidance or forfeiture is a defense which must be proved by the insurer (GLOBE MUTUAL LIFE INS. CO. vs. MARCH, 118 Ill. App. 261; BENES vs. BANKERS LIFE INS. CO., 204 Ill. App. 425, 282 Ill. 236).

It is principally contended on this appeal, (First) That the judgment of the Trial Court should be reversed for the reason that the Court erred in refusing to admit proper and competent evidence; and (Secondly) That the verdict is contrary to the evidence and is not supported by the evidence.

We fail to perceive any reversible error on the part of the Court in connection with the admission or rejection of evidence on the trial of this cause, nor do we believe that the contention is sound that the verdict is contrary to the evidence and is not supported by the evidence. An issue of fact was tendered for the consideration of the jury as to whether or not the policy had been

cancelled, or was in full force and effect at the time of the accident which completely destroyed the car, and the most that could be said in support of defendant's contention herein would be that the evidence in some of its phases was conflicting and that being the state of the evidence, this Court, on review, is not in a position to set aside the verdict in this case, unless we are able to say that the verdict is clearly and manifestly against the weight of the evidence (RICH vs. ALBRECHT, 300 Ill. App. 493; JOHNSON vs. CAMPANELLA, 314 Ill. App. 7). The verdict in this case is abundantly supported by evidence, and we see no reason that would warrant us in any way disturbing it.

Judgment affirmed.

Abstract.

FILED

MAY 5 1945

Stanley R. Brown

CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

February Term, A. D. 1945

Term No. 44019

Agenda No. 19.

RELA ANDERSON,
Plaintiff-Appellee,
vs.
VERUS WRIGHT,
Defendant-Appellant.

Appeal from the
Circuit Court of
Lawrence County.

CULBERTSON, J.

This is an appeal from an injunction entered by the Circuit Court of Lawrence County, in favor of RELA ANDERSON, Appellee (hereinafter called plaintiff), and as against VERUS WRIGHT Appellant (hereinafter called defendant), restraining defendant from farming lands of plaintiff.

The facts and issues in this case, as shown by the pleadings and the evidence, disclose that there had been dispute between the parties as to the time and duration of a lease of corn land on a contract for farming of the lands of plaintiff by defendant. The Court below found that such lease expired on the 1st day of March, 1944, and such finding, under the facts, is conclusive on this Court.

Prior to the institution of the action below, plaintiff had served a sixty-day notice on defendant, requiring defendant to surrender possession of the premises on the 1st day of March, 1944. Notwithstanding that notice, defendant proceeded to plow the corn land with the intention of planting a corn crop which would not mature until the fall of 1944. The Court below, after hearing the

evidence, entered a decree finding that defendant surrender possession of the premises and that all right, title and interest of defendant in the premises would terminate as of March 1, 1944, and further decreeing that defendant be enjoined from entering into possession of the premises for the purpose of claiming any rights by virtue of any lease which had expired on March 1, 1944. The only issue before this Court is whether the decree of the Court below was justified on the record.

While ordinarily equity will not be invoked merely to enjoin a trespass, the record before this Court on appeal does not indicate that merely enjoining a trespass was involved in this case, but that facts and circumstances relating to the possession of property and property rights in connection with the business of farming and cultivating and harvesting of crops to which the defendant had no right, which might result in a permanent and continuing injury to plaintiff, and difficulties of a character which could not be remedied through the ordinary processes of law, were involved (HATELY vs. MEYERS, 96 Ill. App. 217).

Where the Court below has heard the testimony on both sides and had the advantage of observing the witnesses, the decree of that Court as to conclusions on disputed facts, will not be set aside unless the finding is manifestly and palpably wrong. Since, under the record, there appear to be no errors of law justifying a reversal, the decree of the Circuit Court of Lawrence County will, therefore, be affirmed.

Affirmed.

Abstract.

2.

FILED
MAR 5 1945
Stanley B. Brown
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

MARIN KLARICH,

Plaintiff (Appellant)

v.

CATHERINE PARKER and VINCENT M. NOLAN,

Defendants (Appellees)

APPEAL FROM

MUNICIPAL COURT

OF CITY OF N.Y.

MR. JUSTICE KILBY delivered the opinion of the court.

This is an action for damages and attorney's fees based upon a written instrument which plaintiff alleges, and defendants deny, was a contract. Plaintiff appeals from a judgment for defendant after a trial by the court without a jury.

Plaintiff, a general contractor, was asked by Nolan to submit an estimate for remodeling of the premises owned by Nolan's mother-in-law, Mrs. Parker, and the latter's sister Miss Dohney. Plaintiff after examining the premises made a sketch from which his son later made the estimate. There is some dispute in the evidence as to how many times plaintiff, defendants and Miss Dohney met with reference to the remodeling work before the instrument sued on was signed, March 2, 1942. The upper part of the instrument is designated a "Proposal" and the lower part an "Acceptance." It is addressed to Nolan as Estimate No. 4210. Under the "Proposal" plaintiff offered to do the remodeling work for Nolan, "owner of the property", for \$4,273. The offer was signed by plaintiff. The Acceptance bears three lines for signatures of acceptors. Mrs. Parker's signature is on the first line. The second line is blank and Nolan's signature is on the third line. The Acceptance provides that those signing accept the offer and authorize the work and agree to pay the amount specified according to the terms, and provides among other things for the payment of attorney's fees. The day after the instrument was signed, Nolan told plaintiff that

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he wanted to "cancel the contract." The remodeling work was done later by another contractor.

Plaintiff sued and tried his case upon the theory that there was a contract executed between him and defendants through the offer made by him and accepted by them in the instrument. Defendants admitted executing the instrument but denied that it was a contract and tried ^{their} /xxx case on that theory. The character of the instrument is vital and we first give that question our attention.

The trial court indicated that its finding was based upon the view that a further instrument executed by defendants accepting plaintiff's offer was necessary to render them liable. We are not bound by the reasons given by a trial court for its decision and if it appears that the judgment should be sustained for any reason supported by the record, we may affirm the judgment. Plaintiff argues that, so far as the question of a contract is concerned, the instrument itself is sufficient answer; that parol evidence is not admissible to contradict or modify the contract; and that defendants did not in their pleadings or at the trial present the defense raised here and that we should not, therefore, consider that defense. Defendants in their "Defense" and at the trial, denied that a contract had been made. They introduced evidence to prove that the instrument was not to be considered a contract until Miss Dohney had signed the acceptance. In view of these considerations we believe that defendants have not shifted their theory in this court. It is true that parol evidence is inadmissible to alter the terms of a written contract. It is likewise true that parol evidence is admissible to prove, or dispute, the making of a contract. Plaintiff says that an examination of the instrument should conclusively establish that it could be nothing but a legal contract. We have pointed out that the offer appears to have been made to Nolan as the "owner of the

property," and that the acceptance is by Mrs. Parker and Nolan. It is admitted that Nolan did not own the property at the time, but was only a prospective tenant, and that Mrs. Parker and Miss Dohney owned the property. Furthermore, plaintiff testified that he knew the fact of ownership before the instrument was signed, had talked with Miss Dohney as well as defendants, and wanted and had asked for her signature but was told by Nolan not to worry that he would take care of the bill for the work; and that on the day following the execution of the instrument Nolan told him that his mother-in-law and Miss Dohney could not "get together" and did not want to go ahead, and that plaintiff told Nolan that maybe they would agree later. This testimony was given as part of plaintiff's case and, while it is true that he said he did not leave the second line blank for Miss Dohney's signature under the "Acceptance" and did not understand that she was to sign later or to come to his office to sign or to sign it at all, we think the foregoing testimony was sufficient to raise the question of fact, whether the instrument was a contract. Furthermore, though the defendants said that they glanced through the instrument before signing, Miss Dohney was not present when the instrument was signed and Mrs. Parker testified "whatever we signed was not right until she had signed it" and that she told plaintiff, or Mr. Nolan did, that Miss Dohney "had to sign it." Mrs. Parker and Miss Dohney both testified there was difficulty about the changing of the estimates and Miss Dohney said she "didn't like that" and never authorized Nolan to act for her.

Plaintiff argues that had it been the intention to require Miss Dohney's signature, the proposal would have been directed to her as well as to Mr. Nolan. We point out that the proposal although directed to Nolan was signed both by him and Mrs. Parker and that it designated Nolan as "owner." Plaintiff asks with reason why, if Miss Dohney's name was to have been

affixed to the acceptance, would plaintiff have left one copy executed as it was with defendants and taken one away with him? We can only point to the carelessness which seems to have surrounded the transaction. If Nolan told plaintiff not to worry about Miss Dohney's signature because he was to take care of the bill, plaintiff knew at the time that Nolan had no right to contract for the remodeling of the premises without authority from the owners. Plaintiff asks why Nolan did not say the work should not be done because Miss Dohney would not sign, and why did he offer to pay plaintiff's expenses? Plaintiff, himself, testified that Nolan said his mother-in-law and Miss Dohney could not "get together" and that the "contract" would have to be cancelled. We think that the answer to the second point might well be that Nolan felt some obligation to pay whatever expense plaintiff had in connection with the estimate since it may be that he believed he could induce Miss Dohney to sign.

We believe the facts justify the judgment entered by the trial court. The facts fairly support the inference that Miss Dohney's signature was to be added to the acceptance and the second line was left blank for that purpose. Plaintiff says that he had nothing to do with leaving that space blank. If defendants were responsible for leaving that space blank, the inference is that they expected Miss Dohney to sign. That inference is supported by the fact of Miss Dohney's ownership of the property and lack of ownership on the part of Nolan. Plaintiff was not prudent in addressing the instrument to Nolan without determining Nolan's authority and describing Nolan as "owner" when he knew otherwise. Plaintiff is suing for profits which he lost because defendants did not permit him to proceed with the work. He incurred no actual expense beyond his attorney's fees in the case, did not venture on the work, did not obtain permits for the work and did nothing between the day of Nolan's message the

day after the contract, and the day about two weeks later when he discovered another contractor had commenced the work. It is clear from his testimony that he expected Mrs. Becker and Miss Johnney would "get together" and that he was waiting for further word.

Since the evidence shows that it was the intention of the parties to this suit that Miss Johnney should sign the acceptance and since she did not, there was no contract. Centelli v. Rev., 111 Ill. 454; Griefenhagen v. Hubbard, 111 Ill. 19. Other points raised by plaintiff are based upon the premise that a contract was made. We need, therefore, not consider those points.

For the reasons given the judgment is affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J. AND LUCE, J. CONCUR.

43008

JAMES E. COLLINS,

Appellee,

v.

ELGIN, JOLIET AND EASTERN RAILWAY
COMPANY, a corporation,

Appellant.

MR. JUSTICE KILEY DELIVERED THE OPINION

This is an action under the Federal Employers' Liability Act with verdict and judgment for plaintiff, September 29, 1943 in the amount of \$35,000. Defendant has appealed.

It was stipulated that both plaintiff and defendant were, at the time, engaged in interstate commerce. March 14, 1943, plaintiff, a crossing watchman in the employ of defendant, was working on the 4 P.M. to midnight shift at defendant's 94th Street crossing in Chicago. His responsibility covered both the intersection of defendant's tracks with 94th Street, and the intersection, about 40 feet south of 94th Street, of defendant's tracks with those of the Chicago Short Line Railway Company. Defendant's right-of-way extending north and south, carry trains north bound on the east track and south bound on the west track at this point. The Short Line tracks run almost due east and west. The watchman's shanty is on the south side of the Short Line tracks and east side of defendant's tracks. To protect trains on the intersecting roads a semaphore signal tower 25 feet high is located 15 feet south of the Short Line, and 6 feet east of defendant's tracks; and wooden and metal crossing gates are located, one at the northeast and one at the southwest corner of the railroad intersection. These gates when swung into position are fixed by a metal hook to a metal eye on the ground. The semaphore consists of a movable arm and carries a red and green

light. The lights and the position of the arm are controlled by a lever about 4 feet off the ground and 6 feet long. The lever, when the semaphore arm is vertical or horizontal, is held in position by a removable metal pin inserted through two holes beneath the lever, one on each side of the lever guard.

The night of the accident plaintiff received a message, by telephone in the shanty, from the crossing watchman at 100th Street, of a train approaching from the south on defendant's east track. He looked north for a signal that the way farther north was clear, swung the southwest gate north across the Short Line tracks on the west; placed the semaphore in the clear position for the north bound train; swung the northeast gate south across the Short Line tracks on the east; and, taking a lantern, walked north to 94th Street and stood on the west side of the tracks to protect vehicular and pedestrian traffic. He was about 11 or 12 feet from the north bound or east track, facing north toward the next signal, as several cars passed. Hearing an unusual noise, he turned south and, looking at the wheels, saw an object 6 inches from his shins and jumped into the air. A cable 12 or 15 feet in length protruding from the bottom of a "hooper car" struck his shins, knocked his feet from under him, threw him down with his right hand upon the west rail of the east tracks, and a car wheel crushed the second, third and small finger and injured the index finger and thumb of his right hand.

Plaintiff, according to the instructions and argument here, relied for recovery upon violation of a rule promulgated by defendant. Defendant contends the rule was improperly received in evidence and that no proof was made, in any event, that the rule was violated.

On defendant's motion the trial court July 12, 1943, entered an order directing plaintiff to file within 10 days a list of, among

other things, all documents, books and other papers "which are or which have been in his possession or power" material to the merits. Plaintiff did not list the rule relied upon and, accordingly, defendant contends by virtue of Supreme Court rule 17, the rule should not have been admitted, as it was on the trial and that by its admission defendant was surprised and prejudiced. The complaint charged violation of "rules adopted by the defendant" in allowing the cable to be "drawn" along the tracks. While the rule relied on at the trial was not specifically referred to in the complaint, we believe that there was sufficient notice to defendant who drafted the rules and had them in its possession, to preclude surprise or prejudice. Defendant contends furthermore that Plaintiff's counsel had assured its counsel that Plaintiff did not intend to rely upon any rules or book of rules. Plaintiff's counsel deny in their brief that any such assurance was given, and there is nothing in the record except the statement by defendant's counsel to that effect when his objection to admission of the rule was made. We believe the court properly admitted the rule.

The train involved was returning from Hobertsdale, "a couple of miles into", Indiana, with cars which had been carried there loaded with "sinter", a by-product of steel manufacture. At Hobertsdale the cars were unloaded by ^a private contractor using a "clam-shell type of bucket or crane" operated by a derrick "over a trestle". Prior to this accident no inspection was made of the cars after they were unloaded and before the return trip began. Defendant's rule 717, relied on by plaintiff, provides that "No car shall be handled which is known to be overloaded or which is improperly loaded so as to endanger life or property", with certain exceptions not relevant here. Defendant says that there is no testimony from which ^{an} inference of notice to defendant of the protruding cable could be drawn. Plaintiff argues that this is not a case of overloading which requires defendant's knowledge, but of improper loading which requires no knowledge or

Under plaintiff's instruction no. 1 he was required to prove due care, the occurrence, the negligent violation by defendant of its rules in permitting and allowing the cable to be dragged and pulled along the tracks, and the consequent injuries and damages. By defendant's instruction No. 4 the jury was told that defendant should not be held guilty unless it knew, or should have known, of the presence of the cable in time to have it removed. Plaintiff argues that defendant's knowledge was not necessary to that part of the rule relied on, but he does not complain of the giving of the latter instruction. There is the evidence of the unloading practice and equipment, and the inference therefrom that the protruding cable was part of that equipment; and the lack of inspection by defendant before the return trip, the length of the protruding cable, and the trip from Robertsdale. We think that this evidence, with inferences drawn therefrom favorable to plaintiff, was sufficient under the instructions to take to the jury the question whether defendant under the circumstances was guilty of negligence. In C. & E. I. R. Co. v. Reilly, 212 Ill. 506, relied on by defendant, the Supreme Court said that there was no evidence when or where the car was loaded nor that the timber was protruding long enough to put defendant on notice. That is not the situation before us.

Plaintiff's crushed fingers were amputated and the index finger injured so that it will be permanently stiff. There was testimony that defendant's roadmaster had written plaintiff since the accident, to return to work. Plaintiff said that he had not informed the roadmaster that he was physically able to resume work and that the roadmaster had not seen him before writing the letter. A medical witness testified for plaintiff that in his opinion plaintiff could not lift a semaphore lever and insert a metal pin nor open and close a gate of wood and metal where the operation required both hands. He further said plaintiff might push a gate with his body,

lift the lever and swing a lantern with his left hand, but could do no manual labor, nor "with much ease" handle the pin in the signal operation, with his right hand. Defendant offered to show that the watchman on the 8 A. M. to 4 P. M. shift at the 94th Street crossing at the time, had a broken back taped or strapped constantly, so that he could not sit in a normal position; and that plaintiff's predecessor as watchman at the crossing had only part of his upper left arm. This offer was rejected by the court. The court also refused to permit defendant's supervisor of watchmen to give his opinion whether plaintiff was capable of fulfilling the duties of watchman at the 94th Street crossing.

We are of the opinion that defendant was gravely prejudiced by the rejection of the testimony offered and the exclusion of the supervisor's opinion. Plaintiff's medical expert, though not giving his opinion directly that plaintiff could no longer perform the functions at the crossing, certainly indirectly left no other inference than that that was his opinion. What better test could that opinion be given than the one presented by defendant's testimony that plaintiff's predecessor, and a contemporary watchman, both with serious physical handicaps, actually did the work. Furthermore, the supervisor's opinion should have been given to the jury. He was competent to give his opinion on the question of plaintiff's ability to resume work (Swanson v. Prudential Ins. Co., 271 Ill. App. 309; Greinke v. Chicago City Ry. Co., 234 Ill. 564; West Chicago Street Railway Co. v. Fishman, 169 Ill. 196; King & Pillinger, Opinion Evidence in Illinois, page 31 and following). The gravity of these errors can be seen upon consideration of the verdict of \$35,000 and plaintiff's argument here to sustain the reasonableness of it, that plaintiff would have had in normal expectancy of life 21 years of further employment to earn \$38,052. The question of plaintiff's ability to work was a most important element, and the

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errors committed require reversal of the judgment and a retrial of the issues.

Defendant complains of an instruction given at plaintiff's request which informed the jury that if it found for plaintiff it would be required to fix damages; that in fixing damages it should determine the full amount suffered by him as a direct consequence of such injuries; that it should consider his age, earning capacity, etc. and the character of such injuries and the pain and suffering he was reasonably certain to endure; his present and future disability and effect on his earning capacity; lost wages as a consequence of such injuries, and loss of future earnings in consequence of said injuries. Defendant says the jury is not limited by the instruction to those damages proved by a preponderance of the evidence. Plaintiff relies upon Kavanaugh v. Parret, 379 Ill. 273. Neither the instruction considered in that case nor the one in I. C. T. Co. v. Cole, 180 Ill. 334, which the Kavanaugh case follows, considered an instruction identical to the one we are discussing. In those cases there were similar instructions, but in them the juries were limited to the evidence in determining whether the health of the plaintiff was impaired as a result of the injury. In the instant instruction there is no such limitation. There is no other instruction in the series which cures the defect. The recurring term "such injuries" is an indefinite reference for there are no injuries previously mentioned in the instruction to which the "such" may refer. We believe the instruction was faulty.

Since the case is to be retried, we shall not consider the question of the excessiveness of the verdict.

REVERSED AND REMANDED.

BURKE, P.J. AND LUFF, J. CONCUR.

42821

MONTGOMERY WARD & CO., INCORPORATED,
a corporation,

Appellee,

v.

PHILIP BLUM & COMPANY, Inc., a
corporation,

Appellant.

MR. JUSTICE LUPE DELIVERED THE OPINION OF THE COURT.

This is an action of forcible detainer brought in the Municipal Court of Chicago for possession of a four-story and basement building situated on the northwest corner of East Chicago avenue and Kingsbury street, commonly known as 501-507 East Chicago avenue, Chicago, Illinois.

At the close of evidence the court directed a verdict finding defendant guilty of withholding the premises described in the statement of claim, and entered judgment thereon, from which this appeal is taken.

The evidence shows that the plaintiff is engaged in the mail order and retail merchandising business, maintaining branch stores and warehouses throughout the United States; that it purchases and leases real estate used in connection with the operation of its business. Defendant is engaged in the wholesale liquor business; it manufactures cordial and rectifies liquors, and operates a bonded warehouse in the premises in question, and services upwards of 2500 retail accounts in Chicago.

On December 20, 1940, when plaintiff purchased the property in question, defendant occupied the premises under a lease and supplemental agreement which expired on April 30, 1943. At the time of purchase, plaintiff had received an assignment of all of the seller's rights in the lease and supplemental agreement.

Defendant contends it received an extension of the lease to December 31, 1943, by virtue of a telephone conversation with the president of plaintiff company in the month of February, 1943, and that at the time of the institution of the forcible detainer suit defendant was entitled to possession. Prior to the telephone conversation defendant had been attempting to secure another lease from the plaintiff, or an extension of the present one, and had taken the matter up with a Mr. Schilling, who had no authority to grant the extension. It then took the matter up with plaintiff's president, in December, 1942. Defendant's vice president, Mr. Bernstein, testified that he went to the office of the president of the plaintiff company and took the matter up with its president and that he was advised by the president that, "he could not promise me a year and a half but that he may be able to get a year's extension on the lease", and that he said further, "after all, Mr. Bernstein, if one neighbor can't help out another neighbor it is just too bad". He then said, "You go back and don't worry about it". Bernstein further testified that he had not heard from the president or anyone else from the plaintiff company during the month of December, and that on January 15, 1943 he addressed a letter to the president, which was admitted in evidence as defendant's exhibit 1. In his letter we find the following language: "At the time of my visit with you, you intended to take this matter up with the people who have charge of the building we now occupy and you thought you would be able to work something out for us so that we might continue to be neighbors * * * I feel certain that you will do your utmost in connection with having such an extension granted and would very much appreciate hearing from you as soon as a decision has been reached". Not having received a reply to his letter and after receiving a letter from plaintiff company, marked plaintiff's exhibit 2, wherein plaintiff company informed defendant that the plaintiff company had intended to use the property for its own purpose at the

expiration of defendant's lease on April 30, 1943, and requesting the defendant to vacate the property promptly on or before April 30, defendant through Bernstein then telephoned the president of plaintiff company and by this conversation defendant maintains it had an extension of its lease which would expire on December 31, 1943. In this telephone conversation defendant contends that the president of the plaintiff company gave it an extension of its lease to December 31, 1943. Bernstein testified that Mr. Every, the president of the plaintiff company, in said telephone conversation, in response to defendant's inquiry in reference to said new lease or extension, said to him, "that as far as a year or a year and a half lease is concerned, that is out". "I asked him, 'well, how about the end of December, 1943?' He said, 'well, he thought it would be all right for that short a period'. I then asked him about the rental and he said, 'There won't be any additional charge for rent, but I would like you to remove those whisky signs you have on our building.' I said, 'I would be glad to do that', and he said, 'Fine'."

A motion was made on behalf of plaintiff to strike the testimony on the ground that no sufficient foundation was laid for the introduction of said conversation. We feel, from the foundation as laid, as shown by the testimony of Bernstein, the telephone conversation was competent and the court properly admitted it.

(Godair v. The Ham National Bank, 226 Ill. 572; Good v. Tyler, 256 Ill. App. 401.)

Defendant contends that the court erred when at the close of the evidence he instructed the jury to find the issues for the plaintiff as it argues that all that was necessary was to show that they had received an oral extension of the lease and that the burden then shifted to the plaintiff to show that the president lacked authority either implied or otherwise to grant said extension.

Plaintiff contends that the burden was upon defendant to show in the first instance that the president of a corporation had authority to grant said extension. From the conversation of December, 1942, that Bernstein had with Avery the president of the plaintiff company, it is apparent that he knew or should have known that the president of the plaintiff company lacked authority to grant the extension, as Avery told him that he could not promise him a year and a half's lease but may be able to get a year's extension on the lease, and from Bernstein's letter to Mr. Avery under date January 16, 1943, being defendant's exhibit 1, it is apparent that Bernstein knew that Avery had intended to take the matter up with the people who had charge of the building. And Bernstein in his letter further said that Avery advised him that he (Avery) thought he would be able to work something out for him, and in concluding his letter he advised Avery that he felt certain that Avery would do his utmost in connection with having such an extension granted. And again in the telephone conversation that Bernstein had with Avery, Avery informed him, "he thought it would be all right for the short period". This further shows that Avery was compelled to take the matter up with someone else, and that he lacked authority to give defendant a lease. In view of the evidence in this record we feel the court was correct in his ruling on the motion to direct.

For the reasons given, the judgment of the Municipal Court of Chicago is affirmed.

JUDGE OF THE COURT.

BURKE, P.J. AND RILEY, J. CONCUR.

42867

G. S. BLAKESLEE & COMPANY,

Appellee,

v.

WESTERN UNION TELEGRAPH COMPANY,

Appellant.

APPEAL FROM

SUBJECT MATTER

OF 1942

MR. JUSTICE LUKE DELIVERED THE OPINION OF THE COURT.

The plaintiff, G. S. Blakeslee & Company has been engaged in the business of manufacturing and selling commercial kitchen machinery for a number of years. In response to an inquiry for prices on certain machinery from W. J. Van Devanter of the firm of Goodner, Van Devanter, Evans Co., of Tulsa, Oklahoma, the plaintiff replied by telegram quoting the price of \$488 per machine. Defendant Western Union Telegraph Company mistakenly inserted in the telegram delivered to the Tulsa firm the price for each machine as \$448. The Tulsa firm acted upon the offer as received by it and gave orders to the plaintiff for certain kitchen machinery, which orders included five mixing machines. Plaintiff's telegram was dated July 21, 1942, and the Tulsa firm's orders to plaintiff bore date July 31, 1942, and were received by plaintiff on August 3, 1942. The Tulsa firm's orders gave in detail the specifications for the machinery and provided for 50-day delivery, but did not set forth the price for the mixers or the price of any other machines included in the orders. Plaintiff shipped the mixers and billed them at \$488 each. The Tulsa firm refused to pay more than \$448 per mixer, being the amount quoted in the telegram received by it, and after the production of the telegram received by the Tulsa firm, which quoted \$448, plaintiff accepted the \$448 per mixer and filed its claim with the defendant and, upon nonpayment of its claim, instituted this suit. A trial was had by

the court without a jury, resulting in a judgment against the defendant for \$200, and defendant appealed.

The defendant admits that it received the telegram from plaintiff on July 21, 1942 for transmission to the Tulsa firm and that it mistakenly and erroneously transmitted the same containing the price of \$448 per mixer instead of \$488.

It is admitted by the parties hereto that the transmission and delivery of the telegram were governed by the rules and regulations of the tariff by defendant duly filed with the Federal Communications Commission for publication, and that one of the provisions binding on the plaintiff and the defendant alike was a provision with reference to the time within which claims shall be presented to the defendant, this provision being as follows: "The company will not be liable for damages or statutory penalties in the case of any message * * * wherein claim is not presented in writing to the company within 60 days after the message is filed with the company for transmission * * *."

The plaintiff did not file a written claim with the defendant within 60 days after the telegram in question was filed with the defendant for transmission, and the defendant claims that such failure on the part of the plaintiff bars plaintiff from recovery herein.

This court has already decided that the provision for the filing of a claim is binding upon the sender of a telegram. In the case of Rager v. Western Union Telegraph Company, 313 Ill. App. 589, the court (p. 597) said:

"This provision for the filing of claims is valid, binding and effective on plaintiff and he was obliged to comply with it. Having failed to file his written claim within 60 days, he cannot now recover. Those who do business with the telegraph company are as much bound by the rules and regulations approved by the Commission as the telegraph company is to change the rules and regulations by order of said Commission."

The message in the instant case was from Cicero, Illinois, to Tulsa, Oklahoma, and was thus an interstate message subject to the rules and regulations of the defendant which were duly filed with the Federal Communications Commission for publication.

Plaintiff contends that it is not barred from recovery by the 60-day time limitation, because it had no knowledge and had no reason to believe that the defendant had made the mistake complained of; that therefore it had no opportunity to file its claim with the defendant within the 60-day period; that it acted with reasonable diligence after it made the discovery of the mistake in transmitting the incorrect price by the defendant; and that it is not barred by the 60-day time limit but had a reasonable time after its discovery of defendant's mistake, within which to file its written claim. Plaintiff cites the case of Western Union Telegraph Company v. Szizek, 264 U. S. 281, where Szizek filed suit against the Western Union for its failure to deliver to him a message which had been sent to him by one Jones. The court held that the 60-day limitation clause was not controlling because the plaintiff did not know (or had any knowledge of the fact) that the message was sent to him until the 60 days had passed. In that case the court said (p. 286):

"Another clause, not mentioned as yet, reads: 'The company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within 60 days after the telegram is filed with the company for transmission.' This could not be held to apply literally to a case where, through the fault of the company, the plaintiff did not know of the message until the 60 days had passed. It might be held to give the measure of a reasonable time after presenting the claim after the fact was known, in the absence of anything more."

We consider that that case is well reasoned and that the decision of the court was a just and proper one under the facts and circumstances therein, but we are satisfied that that decision is not applicable to the facts in the present case. In the Szizek case, Szizek was the addressee of the telegram and unless informed by the

sender, or some other person, would have had no knowledge that the telegram had been delivered to the Western Union for transmission to him. From the opinion in that case we must accept it as a fact, that Czizek was not informed nor did he know that the telegram had been sent to him, and under those circumstances Czizek could not possibly have filed a claim until he was informed that the telegram had been delivered to the Western Union for transmission to him. It was through the fault of the telegraph company that Czizek did not know that a message had been sent to him, and it would be inequitable and unjust to hold that a person's claim for damages would be barred in a very limited period of time when such person could not, under the circumstances, have known of the existence of his right to a claim for damages.

The present case presents a different aspect. Here the plaintiff was the sender of the telegram and as such had full knowledge that the defendant had received the telegram and had transmitted it in some form to the addressee, because the addressee on July 31, 1942, mailed to the plaintiff written orders for certain items listed in the telegram of plaintiff. Plaintiff knew that the defendant had attempted performance of the delivery of its telegram and also knew or was bound to know that any claim it might have against the defendant would have to be filed with the defendant within 60 days of July 21, 1942.

The question that presents itself is, under these conditions and the other facts appearing in the record, whether plaintiff was excused from filing its claim with the defendant within the 60 days after July 21, 1942. The record discloses the following facts: (1) There was no price specified in the orders received by plaintiff, the order containing the printed words, "price quoted" but with no price appearing under said words; the balance of the order was completely

filled out giving specifications, etc.: (2) that at the bottom of said orders, just above the signature of the Tulsa firm, appear the following printed words, "If you cannot fill this order at once or as directed, notify us immediately. This order must not be filled at higher prices than last quoted without notice": (3) That each order contained the printed stamp, "Aug-3 rec'd": (4) That there appears stamped in red ink upon the face of the order, Project 508, the following: "Answered August 10, 1942" and upon the face of the order, Project 9, the following: "Answered August 11, 1942": (5) That the order for one mixer 903-07 specifies that the machine shall be driven by a 1 HP 220 V, 60 cycle, 3-phase alternating current motor, and that on an "order change" blank of the plaintiff under date August 11, 1942, appears the following: "Change as follows: Make 1/2 HP, obviously a typographical error. We will write re": That this change by plaintiff from the specified 1 HP to a 1/2 HP motor was in accordance with the telegram of plaintiff to the Tulsa firm, because the telegram specified a 1/2 HP motor: (6) That there appears in the record here no copies of the letters of August 10th or 11th, 1942 referred to, nor any other letter acknowledging receipt of said orders, or with reference to the change made in the order from a 1 HP motor to a 1/2 HP motor: and (7) That the next letter from the plaintiff to the Tulsa firm (so far as the record shows) is dated October 6, 1942. Considering the fact that it is usual and customary to acknowledge receipt of orders, the fact that the orders of the Tulsa firm were complete in every detail but contained no specific price for the machines ordered; that the fact that these orders specified that said orders must not be filled "at higher prices than last quoted", without specifying the prices which were last quoted; the fact that there was a mistake in the horsepower of the motor which mistake had to be corrected, because the machine with a 1 HP motor would obviously cost more

than one with a 1/2 HP motor; we feel that correspondence with reference to these matters was necessary between the parties and this conclusion is borne out by the fact that there appears stamped upon each of said orders the legend that same had been answered, one on August 10th and one on August 11th, 1948. These two letters are not in the record, and we feel that since ordinary business prudence required plaintiff to communicate with the Tulsa firm, plaintiff should have confirmed the receipt of the orders from the Tulsa firm and at the same time specified the contract price to be charged. Plaintiff thus had the opportunity to protect itself with reference to the contract price and did not do so. Plaintiff apparently assumed that the defendant had transmitted its telegram to the Tulsa firm in the same words that plaintiff had delivered it to defendant. As the fact developed the plaintiff was wrong in this assumption and in effect claims that it had the legal right to rely upon that assumption and therefore to make no inquiry or effort to determine that the message had been correctly transmitted, even when the Tulsa firm specified no price in its order. We cannot agree with this contention.

To hold that the plaintiff is not bound by the 60-day limitation would in effect nullify the validity of said limitation in a great number of cases. The sender of a telegram might so word his telegram that no answer was required of the addressee for more than 60 days. The sender of a telegram which is incorrectly transmitted as to the price might have further negotiations with the addressee which never again mention the price but refer solely to the terms of performance, and the further negotiations might extend over a period of more than 60 days. The addressee of a telegram might accept a proposal in a telegram which merely stated, "I accept your proposition", where the price was incorrectly transmitted by the telegraph company, there was to be no further communication between the parties and the contract

was not to be performed until after the 60-day period had expired. These examples show that in each of the above assumed cases the sender of the message could claim that he had relied upon the fact that the telegraph company had transmitted the message correctly and that, therefore, in reliance upon the same it was not necessary for him to make any further investigation. To hold the telegraph company in such cases upon the plea of the sender of the message that he did not know that the telegraph company had failed to transmit the message correctly, resulting in his failure to file a claim within the 60-day limitation, would extend said limitation beyond the intent and purpose of the same.

We are not unmindful of the fact that the Supreme Court of Arkansas, in the case of Western Union Telegraph Co. v. Chesapeake, 180 Ark. 422, decided that a claim for damages by the sender of a telegram would not be barred by the 60-day limitation where the sender of the telegram had no knowledge or information within the 60 days that the message had not been correctly transmitted, but we prefer to adopt as more suitable to the facts in the present case, the language in the case of Ideal Concrete Machinery Co. v. Western Union, 212 NYS, 682, where the court said:

"It (the sender of the message) could easily have found out, within the 60 days, whether or not the telegram had been properly transmitted. Indeed, if ordinarily prudent attention had been given to the matter, the error would have been detected very speedily in the regular course of the mails."

And also the language in the opinion of MacDonald v. Western Union, 27 N.Y.S. (2d) 666, where the court said:

"The sender knows that the wire had been filed for transmission and if he does not investigate and submit his claim within 60 days as provided for, it is no one's fault but his own."

We consider that it is the more salutary rule to impose upon the sender of a message by telegraph the duty of investigating whether his message had been correctly transmitted by the telegraph company than to hold that the sender has the right to assume that the telegraph company had correctly transmitted the message and

thus make no investigation even when ordinary business prudence would so dictate. To allow the claim that the sender was not aware of the mistake to prevail, would cause the sender in practically every case where he did not file a claim within 60 days to maintain that he did not know of the mistake and it would open the door for fraudulent claims where the sender actually knew of the mistake and would conceal his knowledge in order successfully to maintain his claim of no knowledge. Such holding would throw a burden upon the telegraph company of attempting to show knowledge when the means of proving same might be exclusively within the possession of the sender.

We are therefore of the opinion that plaintiff was bound by the 60-day limitation with reference to the filing of his claim, and, having failed to file such claim within such period, that it cannot recover against the defendant.

Such finding makes it unnecessary to discuss the point made with reference to whether the damages to plaintiff were speculative, conjectural and problematical.

For the reasons above stated, we are of the opinion that the trial court erred in entering judgment in favor of plaintiff and against defendant for the sum of \$200 and costs.

The judgment of the Municipal Court of Chicago is therefore reversed, and judgment is entered here for defendant and against plaintiff.

JUDGMENT REVERSED AND JUDGMENT HERE.

BURKE, P.J. AND KILEY, J. CONCUR.

43179

FRANKENSTEIN & COMPANY, a corporation,

Appellee,

v.

ADAMS AND AUSTIN BUILDING CORPORATION, a corporation,

Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendant, owner of real estate at the intersection of Adams street and Austin Boulevard in Chicago, appeals from a judgment of \$2,500 entered against it in plaintiff's action to recover for services rendered in procuring a purchaser of the premises.

The complaint consists of two counts, in each of which it is alleged that plaintiff was employed by defendant to procure a purchaser for the latter's premises at a price of \$105,000 net to defendant; that plaintiff produced a purchaser ready, able and willing to buy the premises at a price of \$110,000 to be paid according to the terms specified by defendant, but that defendant failed to accept the purchaser tendered. By the first count plaintiff seeks to recover the fair, reasonable and customary remuneration for the services rendered by it, alleged to be \$5,000. In the second count plaintiff claims \$5,000, the excess of the purchase price offered by his client over the \$105,000 net asked by defendant.

The agent of the plaintiff handling the transaction testified that in the latter part of October 1942, the defendant by oral agreement gave plaintiff the exclusive sale of the property for a period of 60 days. The defendant admits authorizing plaintiff to sell the premises, but denies the exclusive agency. Plaintiff is corroborated to some extent by other persons present at the

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conversation. Plaintiff offered testimony showing that it had advertised the premises and exhibited them to prospective purchasers, and on November 24 presented a purchaser to the defendant who was ready, able and willing to buy the premises for \$110,000, to immediately execute a written contract of purchase prepared by plaintiff and deposit \$2,500 as earnest money. Defendant refused to accept this purchaser, claiming that on November 21 preceding it had sold the premises, and in support of its claim produced a written instrument signed by it and post-dated November 23, 1942, as follows: "Adams & Austin Bldg. Corp. will give James J. Curtis Realtor five days option from the above date to sell bldg. located at North East Cor. of Adams and Austin Blvd. for the sum of \$105,000 rents and taxes all usual expenses prorated. All commission paid by buyer. This option expires without any written notice." It further appears that on November 27, representatives of defendant met at the Chicago Title & Trust Company with Curtis and another realtor, Brenner, for the purpose of executing a contract for the sale of the premises to Mrs. Altman, a client of Curtis', and that after a delay of weeks occasioned by plaintiff's claim for commissions, etc., a contract was entered into and the property was finally sold to Mrs. Altman for \$105,000, with rents and taxes, etc., prorated, and that Mrs. Altman paid to Curtis and Brenner \$1,500 each.

The jury was fully instructed and, on the whole, we think accurately. Objection is made to the giving of an instruction that, "If you believe from the evidence that any witness in this case has knowingly and wilfully sworn falsely on this trial to any matter material to the issues in this case, then you are at liberty to disregard the entire testimony of said witness except insofar as it has been corroborated by other credible evidence, or by facts and circumstances proved on the trial." This instruction

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has been condemned in People v. Flynn, 378 Ill. 351, and in other cases, and should not have been given; but in the many other instructions given the jury it was fully advised as to the matters material to the issues. The giving of this instruction is not reversible error.

It is obvious that the "option" given Curtis to sell the premises of defendant did not constitute a sale of the premises (County of Hamilton v. Sloan, 387 Ill. 24), and that no binding contract for such sale had been entered into by the defendant at the time plaintiff claims to have tendered a purchaser ready, willing and able to buy the premises on defendant's terms. Whether or not plaintiff had been employed to sell the premises, and if so, the terms of such agreement, were purely questions of fact to be determined by the jury. The jury found in favor of the plaintiff and the court approved that finding. Upon the record we cannot say that it is manifestly against the weight of the evidence.

In an effort to sustain the judgment plaintiff erroneously states that the report of the proceedings is incomplete and that defendant wrongfully numbered the instructions given by the court. These charges are without support in the record. The transcript of the proceedings shows affirmatively that it contains all the evidence and all the instructions given by the court. Plaintiff reproduces in its brief portions of the record showing reference by the court and counsel to the instructions by numbers given them, and statements by the respective counsel of their objections or consent to the giving of each instruction.

The judgment is affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

Figure 1. Schematic diagram of the experimental setup.

43261

DOROTHY WITHERSPOON,
Appellant,

v.

CENTRAL GREYHOUND LINES, INC.,
a corporation,
Appellee.

APPEAL FROM

SUPERIOR COURT,

COSHOCTO COUNTY.

MR. PRESIDING JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from a judgment entered upon a verdict of not guilty in her action for injuries sustained when the automobile in which she was riding as a passenger was overtaken and struck by defendant's bus.

The accident occurred on U. S. Highway 20, several miles west of South Bend, Indiana, about 2:15 a.m. Plaintiff, with her two children, father and sister, was en route from Medina, New York, to her home in Blue Island, Illinois. The automobile in which plaintiff was riding belonged to her sister and was being driven by her father. There is no question of plaintiff's exercise of due care. For several miles west of South Bend the highway is a four lane pavement, merging abruptly into a black-top two lane highway; shortly before reaching the change in the pavement plaintiff's automobile passed defendant's bus, and on leaving the four lane highway the right wheels of the automobile were on the right shoulder of the two lane pavement; in attempting to get wholly on the pavement the driver lost control of the automobile and it turned, with the front to the north and, blocking both lanes, skidded sideways to the west. There is a conflict in the evidence as to whether it was raining at the time, but it had been raining and the pavement was wet and slippery. The driver of defendant's bus saw the automobile leave the four lane highway,

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and that it was partly off the pavement. He also saw the effort to get back on the pavement, and applied his brakes when he saw the car begin to skid, but too late to avoid the collision. The controlling question is when the driver, in the exercise of due care, should have taken steps to avoid the collision.

At defendant's request the court gave to the jury the following instruction: "The driver of the bus in question was not required to exercise the highest degree of care to avoid injuring the plaintiff upon the occasion in question but was only required to exercise ordinary care, and if you believe from the evidence in this case, under the instructions of this Court, that the bus at and before the collision in question was being operated with ordinary care and that the driver thereof, in the exercise of ordinary care, did all he could to avoid the accident in question as soon as it was apparent to or ascertainable by him that a collision was imminent, then the plaintiff can not recover in this case." By this instruction recovery by plaintiff was denied if the driver "did all he could to avoid the accident in question as soon as it was apparent to or ascertainable by him that a collision was imminent," thereby making the driver the judge as to when the collision was imminent. Plaintiff contends that in this the instruction was erroneous (citing City of Chicago v. Hickok, 16 Ill. App. 142, and Nelson v. Knetzger, 109 Ill. App. 296), and that the jury should have been instructed that the driver should have acted when it became apparent to or ascertainable to a reasonable person in the exercise of due care that a collision was imminent. With this contention we agree. As the driver testified that he applied the brakes and sought to stop his bus as soon as it appeared to him that a collision was imminent, the instruction was particularly harmful to plaintiff, and for this reason the judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

Ma' lett and O'Connor, JJ., concur.

43271

PIONEER TRUST & SAVINGS BANK,
a corporation, not individually
but as Trustee under Trust No.
4715, dated 4-21-41,

Appellee,

v.

WESTERN TIRE AUTO STORES, INC.,
a corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendant, lessee, appeals from a judgment for \$262 entered in an action against it based upon its alleged failure to yield premises "back to lessor upon the termination of this lease, *** in the same condition of cleanliness, repair and sightliness as at the date of the execution of the lease, loss by fire and reasonable wear and tear excepted."

The case was heard by the court without a jury. No question is raised as to the amount of the damages. Defendant's counsel in their reply brief say, "We are not contending that there is a conflict in the evidence relative to the state of repair of the premises at the termination of the lease. Our whole argument is that there is absolutely no evidence of the state of repair at the beginning of the lease." And again, "It is our whole point that at the trial of this cause plaintiff did not prove what condition the premises were in at the time of the demise." The written lease contained the following provision: "That lessee examined said premises prior to and as a condition precedent to his acceptance and the execution hereof, and is satisfied with the physical condition thereof; and the signing of this indenture by lessee shall be conclusive evidence of the receipt of said premises in good order and repair, except as otherwise specified herein." No exceptions were noted. In Rustad v. Lampert,

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149 Minn. 363, where plaintiff sued defendant for breach of a provision of the lease requiring the lessee to deliver up the premises at the end of the term "in as good order and condition and state of repair, reasonable use and wearing thereof and inevitable accident excepted, as the same now are," the court said: "Plaintiff made out a prima facie case when she proved that the premises were surrendered in damaged condition. It was then incumbent on defendant, if he would avoid liability, to prove that the damage was due to the excepted cause. Underhill, Landlord & Tenant, §537; Peck v. Scoville Mfg. Co., 43 Ill. App. 369."

The judgment is affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

43284

ROSE GUGER,

Appellant,

v.

ALFRIEDA TOLUSAS, ADAM PATEJUNAS,
VERONICA PATEJUNAS and STELLA
STRIKOL,

Appellees.

A PEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from a decree dismissing for want of equity her complaint seeking to set aside as fraudulent two conveyances encumbering and transferring the title of real property of her judgment debtor, the defendant Alfrieda Tolusas.

The complaint alleges that on May 24, 1937, plaintiff sustained personal injuries on the property owned by Tolusas; that shortly thereafter she notified Tolusas of her injuries and instituted suit, obtaining a judgment for \$20,000 on April 7, 1942; that execution, issued May 5, 1942, was returned unsatisfied by the sheriff August 13, 1942; that upon learning of the injury to the plaintiff, the defendant Tolusas and others entered into a conspiracy to fraudulently and secretly dispose of defendant Tolusas' property for the purpose of cheating and defrauding plaintiff in the event she obtained a judgment; that in furtherance of the conspiracy Tolusas executed a trust deed dated May 20, 1937 and recorded October 5, 1937, conveying the premises on which plaintiff sustained her injuries to secure a supposed loan of \$6,000; that Tolusas also executed, without consideration, a deed dated October 4, 1937 and recorded November 1, 1937, conveying said premises to a stenographer in the office of the attorneys for Tolusas "as trustee under the provisions of a trust agreement dated the 4th day of October, 1937, and known as Trust No. 10." The answers admit the conveyances but deny the charges of fraud

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and want of consideration. The complaint contains no allegation of the insolvency or inability of the judgment debtor to pay her just debts as a result of the alleged fraudulent conveyances. It does allege that at the time of the filing of the complaint (1944) Tolusas "owns no other property than the real estate aforementioned."

On the trial no evidence was offered as to the financial condition of Tolusas at the time of the alleged fraudulent conveyances. It was incumbent upon the plaintiff to prove that at the time of those conveyances Tolusas was either insolvent or that the result of the conveyances was to hinder or delay her creditors. Willson v. Labhart, 269 Ill. App. 93. The return of the execution unsatisfied in 1942 established prima facie the insolvency of Tolusas at that time, but it was not evidence of her financial condition almost five years before, when the conveyances were made. State Bank of Clinton v. Barnett, 250 Ill. 312; Susman v. Susman, 251 Ill. App. 392. Plaintiff having failed to establish this material fact, the trial court rightly dismissed the complaint for want of equity.

The decree is affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

43131

CHARLES W. SPEIRING,
Appellee,
v.
THE CHICAGO & EASTERN ILLINOIS
RAILROAD COMPANY, a corporation,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The defendant appeals from a judgment in the sum of \$40,000.00, entered on the verdict of a jury in an action for negligence under the Federal statutes (45 U. S. C. A., §§51-59; 45 U. S. C. A., §23), also Rule 131 of the Interstate Commerce Commission. The gist of the negligence alleged is that defendant failed to provide plaintiff (an employee) a safe place in which to do his work and also failed to provide safe tools and appliances with which to work whereby he was injured.

Plaintiff's complaint was filed February 9, 1943. The defendant answered. It denied any negligence or failure to comply with any rule of law or regulation, material or applicable. The cause was tried by jury. There was a motion by defendant at the close of all the evidence for an instructed verdict in its favor, denied. There was, after verdict, a motion of defendant for judgment in its favor notwithstanding the verdict, denied, and judgment entered, from which this appeal is taken.

Defendant's first contention is that the court erred in denying the request for an instruction in its favor, and also in denying its motion for judgment notwithstanding. This raises the controlling question of law, whether there is any evidence in the record from which negligence alleged in the complaint, on which

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was entered
the judgment/can be sustained. The answer denied negligence of any kind. It averred for a further and separate defense that "at and prior to the time of the happening of the alleged accident and injuries complained of in the complaint as amended, the plaintiff was guilty of negligence which was the sole proximate cause of the alleged injuries complained of by him."

Defendant is a common carrier engaged in interstate commerce, to which the statutes, rules, etc. stated in the complaint are applicable. The plaintiff was a conductor on one of its trains. The train was a "miners'" train, which ran from Danville, Illinois, south to Westville, twelve miles distant and other points. Sometimes the train carried coaches for passengers, sometimes cars for freight. The train was made up at and left Danville in the morning and returned in the evening. The movement in which plaintiff was injured was made at Westville on the early morning of February 23, 1942.

Plaintiff was yard conductor in a crew using yard engine No. 933. The engine had a tender attached to it, also an "auxiliary" tender, or "water car", as it was called. The members of the crew were Mahoney, engineer; Baker, fireman; Freese, head switchman; Luke, rear brakeman; and plaintiff, conductor. All testified at the trial. The train consisted of five passenger coaches, a caboose, four empty tank cars and a loaded box car. The auxiliary tender had been attached behind the tender to the engine for over three years. There was a headlight on the engine, throwing light ahead of it, and a light ^{on the} tender, throwing light to the rear of it. The auxiliary tender was 26 feet 8 1/2 inches long and 9 feet 3 inches high. The main tender was 22 feet long and 9 feet 1 inch high. The center of the main tender light was about 1 1/2 feet higher than the main tender. The unit is shown from different angles by pictures in the record. The train from

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Danville reached Westville shortly after 5:00 o'clock in the morning, while it was yet dark. There was a switching movement to be made there, which involved two of defendant's tracks, called the "main" track and the "house" track. These paralleled each other, running north and south. The tracks at this point were intersected by the Dixie Highway at right angles. The highway ran east and west. It was about 30 feet wide and paved with concrete. On either side of the highway and parallel to it and each other were cross walks for pedestrians. On either side of each of the rails of each track and parallel thereto were heavy boards laid flush with the rails and extending across the paved part of the highway. Between the rails and the boards in each case was room for the flanges of the wheels of the cars of the train. Between the south cross walk and the concrete, at the point where the boards ended south of the pavement, was what plaintiff calls a "hole" between the house track and the main track. This depression was ballasted with crushed stone and cinders. Evidence for plaintiff indicated the boards stuck up about 4 or 5 inches above the ballast. The crossing was constructed by defendant in 1936 and was maintained by it thereafter. There were cross arms to the right of the highway near the track as travellers on the highway approached from either direction with notices thereon to stop on the red signal. There were also street lights near the crossing. North of the highway and just west of the main track was a depot. South of the highway and near the main track was a tavern. The situation appears from a plat in evidence.

At the time of the accident the crew was finishing the operation of switching five cars from the main track to the house track. The cars to be switched were uncoupled and pulled south to a switch leading to the house track. The engine, with its two

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Figure 1. The effect of the concentration of the initiator on the polymerization of α -methylstyrene in the presence of Cu^{2+} and Cu^{+} ions.

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tenders, then backed up to couple onto the caboose and the coaches, and in this movement the accident occurred. The direct cause of the injury of plaintiff was a collision at the crossing between a Chevrolet coupe, driven by Arthur Haskins over the crossing, and the auxiliary tender. Evidence for plaintiff tends to show that in the movement, plaintiff got on the footboard of the auxiliary tender on the fireman's side of it and from there stepped to a stirrup. His lantern was on his right arm, while he held with both hands to the grab iron. Freese gave the enginner the signal to back up. In doing so, the north end of the auxiliary tender came close to the crossing. The headlight and the street lights were on. The enginner blew the whistle, Flasher bells rang and the flasher lights were going. Plaintiff saw the headlight of Haskins' auto approaching, nearly on the crossing, and saw a collision was inevitable. He jumped, landing in what he calls the "hole" or depression between the house track and the main track, caught his feet in one of the planks. He was thrown to the pavement on his left side and permanently and seriously injured.

Haskins testified for plaintiff. He said he heard no whistle or bell, saw no engine headlight shining on the crossing or tracks ahead. He said he drove ahead as he had always done and was hit, by he knew not what. His auto was pushed to the north but not turned over. He drove to the south curb, parked the auto, returned to the place of the accident, then went to the tavern where, plaintiff then was.

Defendant says the instruction in its favor should have been given; that allegations of plaintiff's complaint and his own testimony did not correspond, and that plaintiff's narrative was not consistent, etc.

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It was not necessary for plaintiff to prove every negligent act alleged. Proof of one such was sufficient. The motion for a directed verdict presented a question of law for the court. The rule as stated by Federal jurisdictions was controlling. Brady v. Southern Ry. Co., 320 U. S. 476; Merlo v. Public Service Co., 381 Ill. 300, 311. The motion searched the record for evidence to support a denial of it. Hartford Accident & Indemnity Co. v. Carter, 110 Fed. (2d) 355; Tennant v. Peoria & P. U. Ry Co., 321 U. S. 29, 32.

Witnesses for defendant denied the existence of the hole or depression to which plaintiff's witnesses testified. Pictures of the crossing and the tracks are in evidence and a plat showing the situation. The undisputed evidence showed there was no light on the auxiliary tender. The evidence as to the condition of the road bed and the equipment on the train, etc. is in conflict. The jury returned a verdict for plaintiff. The trial judge approved, and we hold there was evidence sufficient to require the case to go to the jury.

The issues of fact, however, were close. It was important instructions be accurate. Defendant contends those given at the request of plaintiff were so inaccurate as to amount to an instruction for him.

No. 1 is complained of. It told the jury the action was "for a violation of an Act of Congress known as the Federal Employers' Liability Act," which provides as follows:

"Every common carrier by railroad while engaging in commerce between any of the several states. . . shall be liable in damages to any person suffering injury while he is employed by such carrier . . . for such injury . . . resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, bolts, wharves or other equipment."

This instruction, with some deletions, sets out verbatim paragraph 1 of Section 51 U. S. C. A. The instruction is without further explanation of what constitutes a defect or insufficiency in a track or roadbed. The instruction might well have impressed the jury with the idea that there was an absolute liability on defendant if the railroad crossing had any defect or insufficiency in it. Defendant says the law is that a railroad is obligated only to furnish a reasonably safe place for its employees to work.

There is no doubt that the statute does not make the railroad employer a guarantor of the safety of its employee with reference to the place at which he works or the equipment furnished him for use. The statute is Federal. The decisions of the Federal courts are controlling in the construction of it. Huff v. Illinois Central R. R. Co., 362 Ill. 95; Tennant v. Peoria & P. U. Ry. Co., 321 U. S. 29. These courts have held a suit under the statute must have a basis in negligence alleged in the complaint and that without such negligence a plaintiff cannot recover. In Winslow v. Missouri, K. & T. Ry. Co., 192 S. W. 192 (Mo. App.), the court held erroneous an instruction like the above in a similar suit. It said:

"Such instruction could serve no purpose and might easily confuse the jury with reference to certain issues permissible as defenses under the act."

The issues in this case were somewhat involved. The question of whether an instruction in the language of the statute is proper raises a question of law for the court. Clarke v. Storchak, 384 Ill. 564, 583. We hold that under the circumstances of this case this instruction should not have been given.

No. 6 is complained of. It was:

"The jury is instructed that it was the duty of the defendant to exercise ordinary care to furnish the plaintiff a safe place in which to do his work, and that such duty of the defendant toward the plaintiff was continuous and non-delegable."

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Defendant again says the law does not make the employer a guarantor of safety. That is quite true. The instruction, however, does not direct a verdict and we do not think it would mislead the jury.

Defendant also complains of No. 7. It is:

"If you find by a preponderance of the evidence that the accident and injury to the plaintiff was the proximate result of the combined negligence of the driver, Haskins, and the defendant company, the plaintiff is still entitled to a verdict at your hands against the defendant railroad company."

Defendant points out that Haskins was not a party defendant in the cause. It cites Grifenhagen v. Chicago Ry. Co., 290 Ill. 590, 595, and Paliokaitis v. Checker Taxi Cab Co., 324 Ill. App. 21. It is admitted that the instruction stated generally a correct proposition of law but said that, even so, an instruction of this kind is quite likely to confuse and mislead the jury. While the instruction may be subject to criticism on the ground stated, we hesitate to reverse for this reason. Moreover, in the instant case defendant asked and the court gave a similar instruction (No. 31), and defendant for that reason is in no position to complain.

Instruction No. 11 is complained of. It was:

"You are further instructed that if the unlawful conduct of the defendant in moving its engine without a light on the end of the auxiliary tender as required by Rule 131 of the Interstate Commerce Commission and the failure to have such light, directly and proximately contributed to produce the plaintiff's accident and injury, he is entitled to recover a verdict at your hands."

This instruction assumed that the act of defendant in moving the auxiliary tender without a light on the end of it was "unlawful conduct" and that plaintiff was entitled to a verdict if this "directly and proximately" contributed to plaintiff's accident and injury. The instruction directs a verdict. It dis-

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regards the issue of whether the accident was caused solely by negligent conduct of plaintiff. It assumes it was unlawful for defendant to move the engine without a light on the auxiliary tender. While we are disposed to hold the statute and rules of the Interstate Commerce Commission required a light on the auxiliary tender, the epithet "unlawful" should not have been used as it was in this and another instruction. While the law required a light to be placed on the auxiliary tender, the failure to put it on would not create liability unless the jury found this to be negligence proximately causing the injury for which plaintiff sued. Plaintiff's complaint alleged and he tried his case upon the theory that the two tenders were a permanent part of the engine and that the auxiliary tender was not equipped with a light of any kind, as the law and rules require. Defendant contended that the auxiliary tender was a separate car, or type of car, attached only for the purpose of furnishing water, and that the law and the rules as to the light were, therefore, not applicable. We hold that the auxiliary tender as used and as attached must be considered as an integral part of the complete locomotive, to which the statute and rules of the Interstate Commerce Commission were applicable. It was so held in the analogous case of Erie R. Co. v. Public Utilities Comm., 48 N. E. (2d) 100. The instruction as given, however, in substance directed the jury to bring in a verdict for the plaintiff and in this respect was erroneous.

The third contention of the defendant is that the court erred in admitting evidence for plaintiff. This also must be sustained. It contends it was error to receive in evidence a rule of the defendant railroad which required locomotive engineers to whistle at highway crossings. When the question whether the company had any such rule was asked on direct examination of plaintiff, defendant objected on the ground the rule was not made

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for the protection of its employees but for people traveling across the highway. The objection was overruled. The court permitted the complaint to be amended, and in conformity with the amendment a rule was admitted in evidence, which provided:

"Locomotive and rail motor car whistle and bell signals for highway crossings at grade must begin when engine or motor car is opposite whistle sign and be continued until engine or motor car has passed over crossing.

"Standard whistle signal for highway crossings shall be not less than ten seconds duration and consist of two long, one short, and one long blasts, the last blast to end when engine or motor car has passed over crossing.

"These instructions will apply to all grade crossings both within and without cities, villages and towns in Indiana and Illinois, except where especially advised to the contrary."

Defendant moved to strike the rule from the record as not applicable, the motion pointing out that under the rule as stated the whistle would start at the whistling post and that the train movement in question was north of the post. Again the objection was overruled. We think it apparent from reading the rule that it was made for the benefit of people traveling across the highway over defendant's railroad and not for the men crossing the highway on defendant's train. Plaintiff was not in the class covered by the rule, and if it is granted the rule was violated it was no infraction of any duty owed by defendant to plaintiff. Chesapeake & Ohio R. Co. v. Mihal, 280 U. S. 102, 74 L. Ed. 207, reversing 249 Ill. App. 446. See also Thomas v. Downey, 78 F. (2d) 487; Chesapeake & Ohio R. Co. v. Nixon, 271 U. S. 218, 70 L. Ed. 914, 915. Moreover the rule did not apply to this switching movement. We hold it was error to receive this rule in evidence.

For the purpose of this report, the following information was obtained from the records of the Department of the Interior, Bureau of Land Management, and the Bureau of Reclamation, and from the records of the various landowners and lessees of the land in question.

The land in question is situated in the State of California, and is owned by the State of California. The land is situated in the County of Santa Clara, and is situated in the Township of Santa Clara, and is situated in the Range of Santa Clara. The land is situated in the Section of Santa Clara, and is situated in the Quarter of Santa Clara. The land is situated in the Block of Santa Clara, and is situated in the Lot of Santa Clara.

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We will not unduly lengthen the opinion by considering other alleged errors. The judgment will be reversed and the cause remanded for another trial.

REVERSED AND REMANDED.

Niemeyer, P. J., and O'Connor, J., concur.

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MARJA WOLASZEK,
Appellee,

v.

THE POLISH NATIONAL ALLIANCE OF THE
UNITED STATES OF NORTH AMERICA, a
fraternal benefit society,
Appellant.

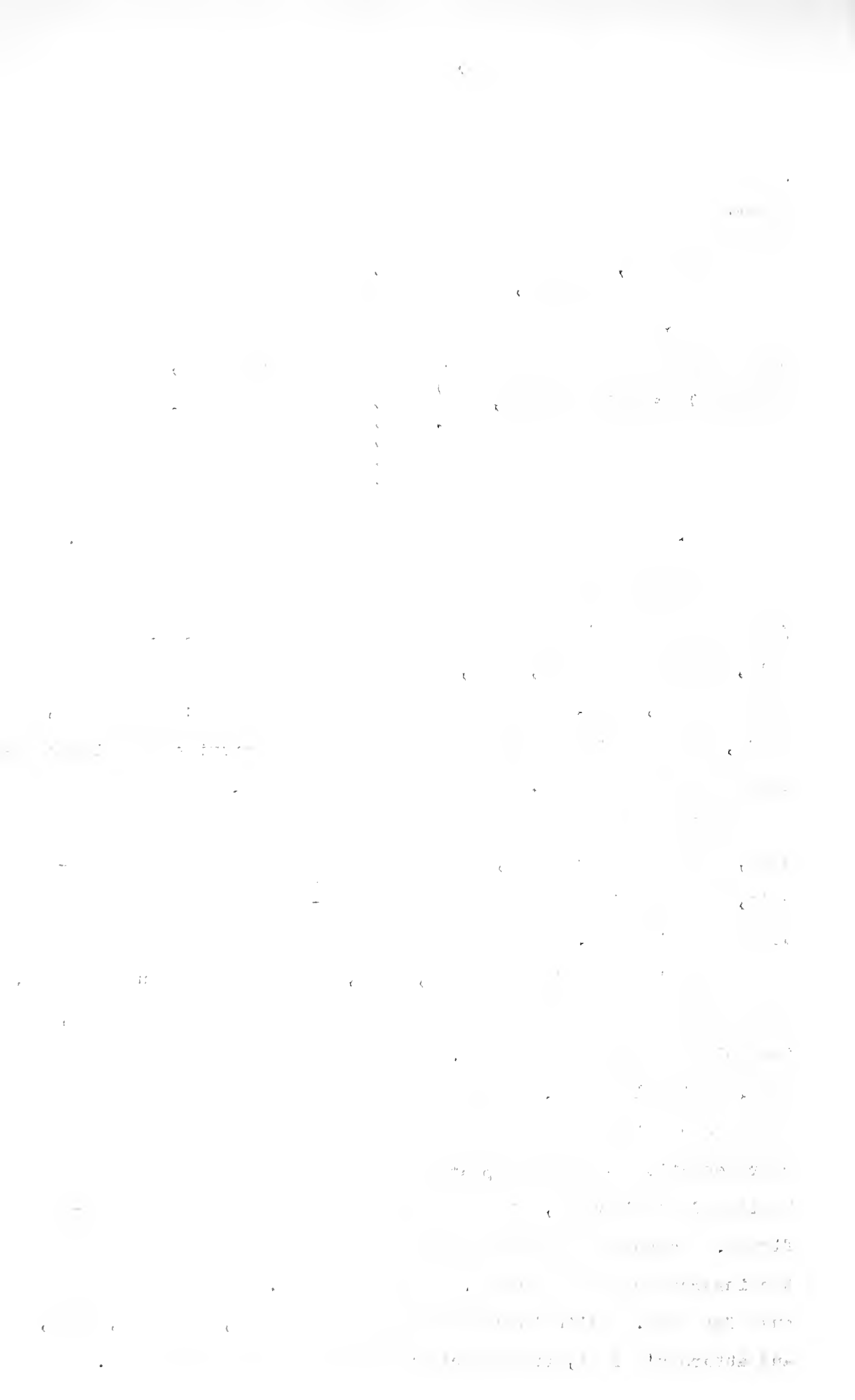
APPEAL FROM

CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Defendant fraternal insurance company appeals from a judgment against it for plaintiff in the sum of \$250.00. The suit, filed January 31, 1942, was on a certificate of registered date June 30, 1940. Eugene Wolaszek was the insured; his mother, Marja, the beneficiary to whom the certificate provided the insurance company would pay \$500.00 on proofs of his death. Paragraph 4 (c) provided that if the death was from tuberculosis after one year, or before two years, after registered date of the certificate, the benefit would be limited to one-half of the face amount of the certificate.

The insured died March 22, 1941, from pulmonary tuberculosis. The insured had complied with all conditions of the certificate, including payment of the dues. Plaintiff demanded payment of \$250.00 with interest. Defendant refused to pay on the ground that the certificate was obtained by false and fraudulent representations as to the past and present condition of the health of the insured, at and before the issuance of the certificate. Defendant tendered to the beneficiary all dues paid by the insured under the policy. It was refused. Plaintiff then sued for \$250.00 with interest from date of death, March 22, 1941, and attorney's fees, under Section 155 of the Insurance Code.



The sole defense was that the certificate had been obtained by untrue and false representations made by the insured as to his health and medical history with knowledge of the falsity thereof, upon which defendant relied to its damages. This defense was set up in the answer, and there was no reply by any pleading to it. The cause was tried by the judge.

The certificate of membership of the insured in the defendant fraternal society, with his application attached, is in evidence. It appears from it the applicant was asked whether he had ever had tuberculosis and, in particular, whether he had ever had spitting of blood or any other symptom of tuberculosis, to which he answered "No"; whether he ever had "pneumonia or any chest or lung disease", to which he answered "No"; whether he had consulted a physician for any ailment not included in other question, to which he answered "No"; whether he was then of sound mind and health and free from disease or injury, to which he answered "Yes".

It appears from the stipulation of the parties in evidence as to the facts that, prior to executing the application, the insured was a patient in the Municipal Tuberculosis Sanitarium and was discharged as cured; that he was examined by defendant's physician, who certified that the applicant was an "insurable risk"; further, that after the issuance of the policy, or certificate, he again became a patient at the Municipal Tuberculosis Sanitarium and died from pulmonary tuberculosis on March 22, 1941.

In the recent case of Hamberg v. Mutual Life Ins. Co., 322 Ill. App. 138, we interpreted Section 154 of the Insurance Code (Ill. Rev. Stat., 1943, Chap. 73, par. 766) and held that where an applicant for insurance gives false answers to questions put to him as to facts material to the risk, with knowledge of their falsity and with the intention to deceive, on which the defendant relied to its damage, such misrepresentations would avoid the policy. That is the unquestioned situation here.

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The policy does not contain an incontestible clause. Plaintiff contends that the absence of such a clause precludes the insurance company from questioning the validity of the contract at its inception or from maintaining that it thereafter became invalid by reason of a condition broken. A large number of cases are cited, including Weil v. Federal Life Ins. Co., 264 Ill. 425, affirming 182 Ill. App. 322. In the Weil case it was held that a clause in the policy making it incontestible one year from the date of its issue was valid, and if the premiums had been paid, would, after one year, bar the defense that the policy was procured by fraud. Other cases cited are to the same effect. On what theory it could be supposed that this and other similar cases cited are authorities for the proposition for which plaintiff contends, we cannot understand.

On the uncontradicted facts in this case, we hold the insured obtained his contract by fraud, which precludes a recovery under the common law and the statute, also. The judgment will be reversed.

JUDGMENT REVERSED.

Niemeyer, P.J., and O'Connor, J., concur.

43296

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

v.

BERNARD DISTENFIELD,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

By this writ defendant seeks to reverse a judgment entered on a finding he was guilty of receiving stolen property, knowing it to have been stolen. He was arraigned, pleaded not guilty, was tried by the court and sentenced to serve ten days in the House of Correction and pay a fine. Motions for a new trial and in arrest of judgment were denied, whereupon this writ of error was sued out.

There is little dispute as to the facts. The stolen property was a two-wheel stroller baby buggy owned by Roberta Rothberg, who lives at 9010 Commercial Avenue in Chicago. She says the value of the buggy is \$5.00. She was not asked what she paid for it. She parked the buggy at Goldblatt's Department Store at 9100 Commercial Avenue in Chicago, where it was stolen by John Skala, a lad eleven years of age.

The defendant conducted two stores in that part of the city - one at 90th Street and Commercial Avenue, another at 2918 East 92nd Street. His business was "wholesale manufacturing of mattresses and furniture jobbing". Defendant had operated this business since 1932. It was founded by his father. He has never been convicted, or even accused, of any other crime of this or any other sort.

The boy who took the buggy and the defendant did not know each other. The boy had a little sister. After taking the buggy

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he put her in it and wheeled it down the alley back of defendant's store, where at that particular time defendant was helping an employee load one of his trucks. The boy wheeled the buggy in a reckless way against the brick wall, and defendant asked him why he was so using the buggy. The boy said his mother had told him to get rid of the buggy, that he was always hurting his sister with it in one way or another. The boy said his mother had told him to sell it and to get at least \$1.00 for it; if he could not get \$1.00 he was to bring it back home and he could take off the wheels and make a wagon out of it. Defendant at first offered fifty cents for the buggy but later paid the dollar for it. It was taken by defendant to the 92nd Street store. It was not concealed in any way. It was found there by the police, (to whom the owner had complained,) when defendant was not at the store, and they did not talk with him about it before taking it. The police returned the buggy to the owner.

The testimony is quite indefinite as to the condition and value of the buggy. Defendant says that after painting and fixing it up he could have sold it for \$5.00. The judgment finds the value to be \$6.50.

This is practically the entire evidence. Defendant, the owner, the police officer and the boy who took the buggy, all testified in the case.

The buggy was recovered by the police July 31, 1944. A capias was issued for defendant on the next day, and he was arrested August 2, 1944. When arraigned he pleaded not guilty. When asked by the clerk whether he wanted to be tried by the court or a jury, he answered, "By this Court". The court then asked, "Do you have an attorney?" Defendant replied, "No, I don't think I need an attorney". The State's Attorney then said, "Well, the statute provides for a fine up to \$1,000.00 and one year imprisonment. I want to tell him that." The court then said, "Swear the witness".

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We think it unnecessary to discuss the cases at length. On the authority of People v. Rubin, 361 Ill. 311, we hold that this conviction cannot stand. In the opinion in that case, after stating the constituent elements which must be proved in order to sustain a conviction for receiving stolen property, the Supreme Court said:

"The element of guilty knowledge on the part of the receiver must be proved, beyond a reasonable doubt, to have been present at the time of the receipt of the goods by him."

Plaintiff in error, as we have said, has never been convicted nor even accused of a similar or any other crime. He might have been wiser, but that is not a sufficient reason for commitment to a penal institution.

The judgment will be reversed.

REVERSED.

Niemeyer, P. J., concurs.

O'Connor, J., dissents.

43299

CLARENCE C. WALTERS and HOPE WALTERS,
Appellees,

v.

CHECKER TAXI COMPANY, a corporation,
and PAUL THIEDE,
Defendants,

CHECKER TAXI COMPANY, a corporation,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

On April 20, 1943, Clarence C. Walters and Hope Walters, his wife, filed a complaint of two counts against Paul Thiede and the Checker Taxi Company. The first count averred that on March 27, 1943, plaintiffs were passengers for hire in the taxi of the Checker Taxi Company to be transported from the Monon depot in Chicago to their home on Merrill Avenue; that while being driven in an easterly direction on the south side of East 71st Street the cab in which they were riding collided with a Chevrolet automobile owned by Paul Thiede and by him driven westerly on the same street; that as a result of the collision and negligence of both defendants, plaintiffs were injured. The second count averred that in the same occurrence Paul Thiede was negligent and that his negligence was wanton, wilful and malicious, and that as to him malice was the gist of the action.

Pending the suit, on January 22, 1944, Clarence Walters died, but not from any injury received in the collision. His administratrix was substituted as plaintiff.

The causes were put at issue and submitted to a jury. The jury, in response to an interrogatory, replied that Thiede did

The first part of the paper is devoted to a discussion of the general principles of the theory of the structure of the atom. It is shown that the structure of the atom is determined by the laws of quantum mechanics, which are based on the principle of the conservation of energy and the principle of the conservation of momentum.

The second part of the paper is devoted to a discussion of the experimental results obtained in the study of the structure of the atom. It is shown that the experimental results are in good agreement with the theoretical predictions of the theory of the structure of the atom.

The third part of the paper is devoted to a discussion of the applications of the theory of the structure of the atom. It is shown that the theory of the structure of the atom has many important applications in the fields of physics, chemistry, and biology.

The fourth part of the paper is devoted to a discussion of the future prospects of the theory of the structure of the atom. It is shown that the theory of the structure of the atom is still in the early stages of development and that there are many important problems that need to be solved in the future.

The fifth part of the paper is devoted to a discussion of the conclusions of the paper. It is shown that the theory of the structure of the atom is a very important and interesting field of research and that it has many important applications in the fields of physics, chemistry, and biology.

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not operate his automobile in a wanton and malicious manner and that malice was not the gist of the action against him. The jury, however, returned a verdict of guilty of negligence against both Thiede and the cab company and found the damages of Mrs. Walters to be \$2,000.00 and of Clarence Walters, \$250.00. At the close of the evidence each defendant made a motion for an instruction in its and his favor, which was denied, and after verdict the defendant cab company made motion for judgment in its favor notwithstanding the verdicts, which were also denied. Judgment was entered on the verdicts, and defendant Taxicab Co. has appealed from each judgment.

It is urged for defendant taxi company that the motion for a directed verdict in its favor should have been allowed and also its motion for judgment notwithstanding as to each of the verdicts should have been granted. It is also urged that the judgments are each against the weight of the evidence and are the result of prejudicial misconduct of the attorney for defendant, Thiede as well as the attorney for plaintiffs; that the trial court erred in admitting prejudicial evidence and in giving instructions.

The defendant taxi company is a common carrier of passengers in the City of Chicago. Its cab in which the plaintiffs, Mr. and Mrs. Walters, were riding from the Monon station at 63rd Street to their home at 7306 Merrill Avenue, was driven by Jordan Johnson, an employee east on 71st Street a public highway running east and west. Near the scene of the collision 71st Street is intersected by Woodlawn Avenue, another public highway, which runs north and south. At the place where the accident occurred there is a slight jog in Woodlawn Avenue, so that eastbound traffic approaching from the west must turn slightly to the north and westbound traffic approaching from the east must turn slightly to the south. Between the curbs 71st Street is about 50 feet wide but in the jog about 48 feet wide.

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Johnson, the driver of the cab, testifies in substance that he was driving east on the south side of 71st Street; that Thiede's automobile came from the east, going west on the north side of the street and coming from behind the traffic suddenly turned to the south side of the street, and notwithstanding the efforts of the cab to escape, hit it. Mrs. Walters corroborates the driver of the cab, so do Mr. and Mrs. Honeywell, who were driving east just behind the cab, also Mr. Finnegan, who stood on the corner near where the collision occurred and where he had a good view of it; Donohue, King and Bernat, police officers, who were on the ground investigating a few minutes after the collision occurred, give testimony tending to corroborate the driver of the taxicab.

On the other hand, Thiede testified that he was driving about 15 or 20 miles an hour; that there was no white line in the center of 71st Street; that his car was entirely on the north half of 71st Street from the time he came through the Illinois Central viaduct until he reached the Woodlawn Avenue intersection; that he first saw the cab about 150 feet away, and that the cab, for some reason he could not explain, turned to the left in front of him without notice, and that the collision occurred on the north side of the street. Thiede's testimony is corroborated by that of a fellow workman, Harry E. Burke, and his wife, Nina Burke, who were riding with him. The evidence shows that these three prior to the collision spent about two hours together at a tavern on Stony Island Avenue between 63rd and 64th Streets. At this time ^{they} were driving west, their destination McGinty's Tavern on Cottage Grove Avenue. Thiede insists he was not drunk. These two companions testify that he was sober. Other witnesses, who corroborate Johnson, gave

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their opinion to the effect that he was drunk, and the pictures in evidence showing the situation of the taxicab and the automobile with reference to each other after the collision corroborate the testimony of the driver of the cab as to the manner in which the collision occurred and the condition of Thiede.

Manifestly, (the evidence thus in conflict) the court did not err in refusing the peremptory instruction requested by the taxicab company or in denying its motion for judgment notwithstanding the verdict after it was returned. A clear preponderance of the evidence indicates Thiede was drunk, and that while drunk he drove his automobile recklessly, and that this was the real cause of the collision.

At the request of plaintiffs the court instructed the jury "that where any injury occurs through the concurrent negligence of two persons and would not have happened in the absence of negligence on the part of either person, the negligence of both is the proximate cause of the accident and both are answerable for the consequences resulting from their combined negligence".

In Grifenhagen v. Chicago Rys. Co., 299 Ill. 590, Blackwell v. v. Fernandez, 324 Ill. App. 597, and Paliokaitis v. Checker Taxi Co., 324 Ill. App. 21, it was held that while this instruction stated a correct proposition of law, under the circumstances appearing it was likely to mislead the jury. The same situation exists here.

Instruction No. 28 for plaintiffs also told the jury that if it should find from a preponderance of the evidence and under instructions "that the defendants are not guilty, as charged in the complaint, then you will have no occasion to consider the question of damages". This instruction in effect told the jury that to compensate the plaintiffs for their injuries, both defendants should be found guilty. Under this instruction the jury could not find defendant Thiede guilty and the taxicab company not guilty. It was

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manifestly erroneous. Blackwell, et al. v. Fernandez, et al.,
324 Ill. App. 597.

Just criticism is also made as to the conduct of the attorney for Thiede, which we shall not discuss at length. We assume it will not be repeated on another trial.

The defendant taxicab company is entitled to a fair trial of the issues in this case, and for that reason the judgment as to it will be reversed and the cause remanded.

REVERSED AND REMANDED.

Niemeyer, P. J., and O'Connor, J., concur.

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ESSIE WEIL,
Appellee,

v.

GOLDBLATT BROS. INC., a Corpora-
tion,
Appellant.

APPEAL FROM

CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against defendant to recover damages for personal injuries sustained by her through the alleged negligence of defendant. There was a verdict and judgment in plaintiff's favor for \$17,500 and defendant appeals.

The record discloses that defendant conducts a large department store which is located on the east side of State street and extends from Jackson Boulevard on the north to Van Buren on the south; that about 11:30 A. M. January 7, 1943, plaintiff was going into the store at the entrance on State street near the north end of the building to make some purchases and to have her lunch. It was snowing at the time and had been doing so for the past few days and there was snow, slush and ice in the entrance way. Plaintiff slipped and fell and was severely injured. Her contention is that she was in the exercise of due care and that defendant was negligent in failing to keep the vestibule in a reasonably safe condition for its customers. On the other side defendant's theory is that at the time of the accident and for some days prior thereto, the weather was inclement in that it snowed, rained and sleeted, as a result of which the streets and sidewalks were covered with slush, snow and ice. That the vestibule through which plaintiff was entering the store was wet from slush, snow and ice being tracked in by its customers and that defendant exercised reasonable care and caution in endeavor-

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$\frac{1}{2} \left(\frac{1}{2} \right) = \frac{1}{4}$

Figure 1. The effect of the concentration of the inhibitor on the rate of polymerization of α -methylstyrene in the presence of SnCl_4 at 25°C .

$$\frac{d}{dt} \left(\frac{\partial L}{\partial \dot{x}} \right) = \frac{\partial L}{\partial x}$$
[illegible]

1. *Chlorophyll a* (Chl a) and *Chlorophyll b* (Chl b) are the primary photosynthetic pigments in green plants. They are responsible for capturing light energy and converting it into chemical energy through the process of photosynthesis. Chl a is the most abundant pigment, while Chl b is present in smaller amounts. Both pigments absorb light most efficiently in the blue and red regions of the visible spectrum.

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ing to keep the vestibule clean. Defendant's position further is that plaintiff was guilty of negligence as a matter of law and the court erred in denying its motion made at the close of all the evidence for a directed verdict and for denying its motion for judgment notwithstanding the verdict. Defendant further contends that in any event the verdict is against the manifest weight of the evidence; that the court erred in its instructions and that the verdict is grossly excessive.

Plaintiff testified that she was 57 years old, was employed on the day of the accident and for about 3 years prior thereto, as a saleslady for the "Hub," a large department store across Jackson Boulevard from defendant's store. That she was also in the insurance business with the Travelers' Insurance Company of Hartford, soliciting mostly; that she took care of this work sometimes when she was at lunch and in the evenings and on Sundays and holidays; that her annual income from both of her employments was about 1,250. That on the day of the accident she was working at the "Hub" and left a little before 11 o'clock to attend to some insurance matters at 175 West Jackson Boulevard, which was about 4 blocks west of State street; that when she had attended to them she started back to defendant's store to have her lunch and to make some purchases; that she went into defendant's store for lunch about every day.

That there were 3 sets of swinging doors in the entrance way which opened on the sidewalk and inside the doors there was a vestibule about 5 feet wide and 15 feet long, on the east side of which there were 3 revolving doors for persons to enter and leave the store; that it was snowing and raining on the day, the sidewalks and streets were "all slushy and icy and snowy." That she had on her winter coat, wore galoshes, carried an umbrella and her purse; that as she went in through the swinging doors that the entire floor of the vestibule "was covered with snow, and slush and mud". That the snow was between the swinging doors and the

1. The first part of the paper is devoted to a general discussion of the problem of the origin of life. It is shown that the problem is one of the most important and most difficult in the history of science. The author discusses the various theories of the origin of life, from the spontaneous generation theory to the modern theory of the origin of life from non-living matter. The author concludes that the modern theory of the origin of life is the most plausible and most convincing.

2. The second part of the paper is devoted to a detailed discussion of the modern theory of the origin of life. The author discusses the various stages of the origin of life, from the formation of the first organic molecules to the formation of the first living cells. The author concludes that the modern theory of the origin of life is the most plausible and most convincing.

3. The third part of the paper is devoted to a discussion of the various problems connected with the origin of life. The author discusses the problems of the origin of the first organic molecules, the origin of the first living cells, and the origin of the first complex organisms. The author concludes that the modern theory of the origin of life is the most plausible and most convincing.

4. The fourth part of the paper is devoted to a discussion of the various problems connected with the origin of life. The author discusses the problems of the origin of the first organic molecules, the origin of the first living cells, and the origin of the first complex organisms. The author concludes that the modern theory of the origin of life is the most plausible and most convincing.

5. The fifth part of the paper is devoted to a discussion of the various problems connected with the origin of life. The author discusses the problems of the origin of the first organic molecules, the origin of the first living cells, and the origin of the first complex organisms. The author concludes that the modern theory of the origin of life is the most plausible and most convincing.

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revolving doors "about an inch thick and about as wide as the revolving doors," and that at the side of this path the floor was slushy; that she walked to the revolving door on the snow because "It appeared slipperier to the sides of it." That as she crossed the vestibule her feet "shot from under me *** I went down on my left hip with my back and my shoulder and my head in the revolving door - *** I had not stepped into the revolving door." That people came to her assistance and a nurse from the store and a man with a wheel chair, and she was taken up in the elevator and given First Aid after which she was taken to the University Hospital in an ambulance and the next morning was taken to Wesley Hospital where she remained for 31 days during all of which time she was in great pain. The neck of the left femur was broken and she was otherwise injured. At the time of the trial, which was about 18 months after the accident, she was using a crutch.

Bernice Rosenthal, called by plaintiff, testified that she was coming out of defendant's store through the south revolving door when she saw the accident and plaintiff was coming in through the middle door which was immediately north. That plaintiff had not got to the revolving door when her feet went out from under her and she fell on the floor. "After she fell she was right in between the door with her feet out." That I then called for a policeman who came shortly afterwards and the assistant manager and other people from the store. That the floor was "all slushy *** it was all ice underneath the snow;" that by slush she meant "snow and ice mixed. *** Where the people came in it was snowy but in the ends of the vestibule it was wet and full of like mud. It was very wet like melted snow;" that when plaintiff was put in the wheel chair to receive First Aid she went with her. On cross-examination she testified that she had worked for Goldblatt Bros. as a cashier for about 3 weeks; that she left "Because they were so cheap they docked you for 15¢." That it was a very bad day and had been so all that morning.

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That she had never seen plaintiff except just before the accident; that "Mrs. Weil was in the middle revolving door, ***. There was ^{not} another woman in this revolving door, ***. She was/able to get out after the accident. She remained in that revolving door, maybe about five or ten minutes. I didn't pay much attention to the woman. They had to open and close the revolving doors to let her out." That the floor in the vestibule was slushy. That her deposition had been taken May 17, 1943 when she stated that she did not examine the floor of the vestibule, "I saw the mud and dirt and the wet and it was cold because the woman was laying on it;" that she had made those answers to the questions when her deposition was taken. She was then asked: "You didn't say anything about ice in this deposition? [A.] You did not ask me what my idea of slush was. [Q.] What is your idea? [A.] My idea is snow and ice."

Other witnesses were called by plaintiff, including police officers, as to whether there was slush, snow and ice in the vestibule and whether it had been swept or cleaned prior to the accident. Some of the officers were called by plaintiff and some by defendant. Some had been in the vestibule prior to the accident and some shortly afterward.

Louis E. Blockham, called by defendant, testified that he had worked as a porter for defendant for about 3 1/2 years and that on the day in question there were three porters on the main floor; that it was wet and snowy on that day and he was assigned to take care of all the vestibules, mopping them up and seeing that they were clean. There were 7 entrances on the main floor of the State street store. That he got there about 9 o'clock in the morning and the store opened about 9:45; that he mopped the entrances on that day beginning at 10 o'clock at the north entrance on Jackson Boulevard; that he got out mats, put them down and mopped the floor with a mop and wringer and pail; that it took him about a half hour at that entrance; that about 10:30 he went to the State street entrance in

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question, started to mop it up about 25 minutes to 11, using a mop, pail and wringer and after finishing about 11 o'clock he went to another entrance further south in the store. On cross-examination he testified that after finishing mopping the vestibule on Jackson street he went to the one in question, beginning there about 10:30 and finishing about 5 or 10 minutes after 11.

Anthony Posedel, called by defendant, testified that he was employed by defendant for the past 6 1/2 years and had charge of the 32 porters who worked for him in defendant's State street store which contained 11 floors and 2 basements; that on the day in question he had 3 porters on the main floor, one of them being Louis E. Blockham, who mopped the 6 vestibules on the main floor; that January 7 "was a very bad day." There was rain, sleet and snow; that the day before it also rained and snowed; that he did not see the accident but got a call about 11:30 or a quarter to 12 and went to the entrance in question when the nurse and doctor were placing plaintiff on a wheel chair; that Blockham was there at the time. That one of the panels of the revolving doors was broken. "The floor was wet. I didn't see any ice or snow in the vestibule," which was about 14 feet long and 8 feet wide. "I am positive there is a grill that emits heat on the north wall of this hallway. It is connected with the hot air system that is throughout the entire store." On cross-examination he testified that the porters wore tan uniforms and that Blockham came to work about 9 o'clock and the store opened at 9:45. He then explained about Blockham's duties of wiping up the vestibules with a dry mop, etc.

Under the law defendant was required to use reasonable care to see that its premises were reasonably safe for its patrons. Denny v. Goldblatt Bros., Inc., 298 Ill. App. 325. And in such a case as the one at bar plaintiff must be in the exercise of reasonable care for her own safety.

A great many cases are cited and discussed by counsel for

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each side tending to support their respective positions but we think it would serve no useful purpose to discuss them. The rules of law applicable are well settled. The decision of each case depends upon the particular facts of the case under consideration. In the instant case, whether plaintiff was in the exercise of due care for her own safety and whether defendant failed to use reasonable care to see that the entrance to its store was reasonably safe for its patrons we think was for the jury and not for the court. We are further of opinion that the verdict of the jury, approved as it was by the trial judge, finding in effect that defendant was negligent, is against the manifest weight of the evidence. We think the overwhelming weight of the evidence is that the vestibule in question was mopped and cleaned by one of defendant's employees about 30 minutes before the accident.

We are further of opinion that the contention of counsel for plaintiff, that the evidence shows that there was ice underneath the snow in the vestibule on which plaintiff walked, cannot be sustained by a consideration of the evidence but is contrary to the overwhelming weight of it. The vestibule was heated; there was snow, slush and ice on the street and sidewalk, it had been raining and sleeting and this had been the state of the weather the day before. On the day in question it was not very cold. In these circumstances it is our duty, under the law, to set aside the verdict and judgment as being against the manifest weight of the evidence.

Defendant complains that the court erred in giving two of plaintiff's instructions and in refusing two instructions offered by it. We think the two instructions given at plaintiff's request are not subject to the objections made by counsel for defendant and the giving of them was not reversibly erroneous. We think there was no error in refusing defendant's instruction 16 as it was covered by defendant's instruction 8. We are further of opinion that it was

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not reversibly erroneous for the court to refuse defendant's offered instruction 4. This instruction was covered by others given.

However, we think we ought to say that the record fails to disclose at whose request the instructions were given or refused and although they are inserted in the common law record instead of in the report of the proceedings, which is the proper place, it is our duty to consider them. Kelly v. Powers, 303 Ill. App. 198; Horvat v. Opas, 315 Ill. App. 229. Moreover, the instructions are not numbered in the order in which they appear. For example, the first instruction, which the abstract shows was given at defendant's request, is Number 12, the next instruction is Number 9. Then follow three instructions without any numbers, which the abstract shows were given at plaintiff's request. This procedure gives us a great deal of unnecessary work and the argument on the instructions is therefore confusing.

The judgment of the Circuit court of Cook county is reversed and the cause remanded.

REVERSED AND REMANDED.

Niemeyer, P. J., and Matchett, J., concur.

ESTHER M. FALSTROM,
Appellant,

v.

SPENCER CORPORATION, an Illinois
Corporation, ROGER G. MINAHAN, W.
G. STURN and JOHN J. BICKEL, Jr.,
as Trustees under Trust Agreement
dated December 29, 1936, creating
THE SPENCER TRUST,
Defendants.

G. LARSON, Intervening Petitioner,
Appellee.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal plaintiff seeks to reverse a decree entered by the Superior court of Cook county May 26, 1944, which recites that the matter came on for hearing on the pleadings and evidence and found that the intervening petitioner, G. Larson, "has a good, valid and subsisting contract" with the defendant, Spencer Corporation, for the purchase of the real estate involved; and further found that the complaint was without equity and plaintiff should be granted no relief. It was decreed that the complaint be dismissed for want of equity.

The record discloses that the property involved in this proceeding is a building located at 300 to 314 East Garfield Boulevard, Chicago, improved with a three story and part two story and basement hotel and store brick building, containing stores, hotel rooms and apartments, which was subject to a mortgage, and that the property was reorganized and a trust agreement executed December 29, 1936, by the terms of which three trustees were appointed; that defendant, Spencer Corporation, was organized and all of the stock, aggregating 1070 shares, was issued to the trustees and

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certificates of interest were issued to the bondholders in exchange for their bonds. The trustees continued to operate the building which was the only asset of the corporation, from the date of their appointment.

May 19, 1941, the trustees sent a letter to the certificate holders stating that they had received an offer of \$60,000 for the building and recommended acceptance. The proposed sale, the complaint alleges, was frustrated by an action of one of the certificate holders in a proceeding in the Superior court. That more than 2 years after the offer of \$60,000 the intervenor, G. Larson, on September 10, 1943, offered \$67,500 for the property and 4 days later, increased her offer to \$70,000 without the payment of any real estate broker's commission. November 27, 1943, the Spencer Corporation entered into a written agreement with the intervenor, G. Larson, to sell her the property for \$70,000, under certain terms and conditions and a deposit of \$6,500 as earnest money was made by Larson. December 10, 1943, the trustees sent a letter to the certificate owners advising them of the proposed sale to Larson and they recommended that the offer be accepted and the property sold. The letter further advised that in the agreement the right was reserved to accept higher offers within 20 days from the date the notice was given, provided there would be a net increase in price of \$2,500, or multiple thereof, and that the corporation reserved the right to accept the higher offer unless Larson within 3 days after notice thereof, agreed to meet such higher offer.

December 29, 1943, plaintiff, who was the owner of a participation certificate for 30 shares, or \$3,000, offered \$80,000 for the property on the same terms as the offer made by Larson and tendered \$7,500 as earnest money. In the agreement of November 27, 1943, made by Larson, the right was reserved to her, in case there was a higher offer made, to meet the higher offer within 3 days after she was notified and on January 4, she raised her offer to \$80,000.

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January 10, 1944, plaintiff filed this suit and in her complaint offered to pay \$85,000 for the property and tendered \$7,500 as earnest money as evidence of good faith. January 11, 1944, the trustees, as shareholders of the Spencer Corporation, met at 11 o'clock A. M., approved what had been done and ratified the contract with Larson to sell the property for \$80,000, without commissions. At 1:30 o'clock on the afternoon of January 11, plaintiff served a notice on defendants notifying them of the filing of her suit and that on January 13, she would move to enjoin the sale to Larson. Upon receipt of the notice the parties and their counsel conferred to see what could be done and on the same day, January 11, 1944, defendants at 4:37 P. M. entered their appearance by their counsel.

At the beginning of the hearing of the case, on February 9, 1944, counsel for plaintiff said: "I am tendering a certified check drawn on the First National Bank of Chicago, dated January 11, 1944, for \$7500," and offered to endorse the check to the Spencer Corporation as earnest money and as evidence of plaintiff's good faith to carry out her offer of \$85,000 for the property. Thereupon counsel for defendants said: "We, of course, would like to get \$85,000 for the bondholders but here we have no power to accept it on behalf of the bondholders so we must reject it."

On May 19, 1941, the trustees notified the certificate owners that on April 11, 1938, an appraisal committee of the Chicago Real Estate Board valued the property at \$65,743; on October 16, 1939, a committee found that the property had a speculative value of \$82,000; and on March 1, 1941, an appraisal committee found that the property had a speculative value of \$75,000.

Plaintiff's position, as stated by her counsel is (1) that the trustees "did not use care, prudence or diligence in attempting to dispose of the real estate" which was the only asset of the corporation; (2) "That the alleged contract was unauthorized, invalid

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and of no force and effect;" (3) that the \$70,000 offered by Larson was wholly inadequate as is shown by plaintiff offering \$80,000 and which increased offer was promptly met by Larson. Counsel further contend that the day before the contract with Larson was approved by the trustee, namely January 11, she had filed her suit and that the suit "therefore was Lis Pendens;" that the trustees should have accepted plaintiff's offer of \$85,000. And further "that in the sale of the property, the corporation did not comply with the provisions of the Business Corporation Act of Illinois." And "that the proposed sale for \$80,000 to Larson be enjoined;" that plaintiff's bid be entertained and the court conduct and direct the manner in which the property should be sold.

It has long been the settled law, which is undisputed in the instant case, and as stated by counsel for plaintiff: "trustees should use care, diligence and prudence in the administration of the trust, and owe allegiance, loyalty and fidelity to the cestui que trust," citing Meinhard v. Salmon, et al., 249 N. Y. 458 (164 N. E. 545): Straus v. Chicago Title & Trust Co., 275 Ill. App. 63. It has often been said that "The care and prudence to be exercised by trustees is that which ordinary men would exercise under like circumstances in connection with their own affairs. If a trustee "has exercised the care and judgment of ordinarily prudent men in their own affairs he will not be chargeable for mere errors of judgment nor for accidental injuries and losses." (§ Pomeroy's Eq. Jur., 3rd Ed. §1070)' Wylie v. Bushnell, 277 Ill. 484;" Pank v. Chicago Title & Trust Co., 314 Ill. App. 53. But as we said in the Pank case, in quoting from an opinion by Judge Kenyon, in Thompson v. Hayes, 11 F. (2d) 244, when after quoting §1070 of Pomeroy he said: "The rule should be even stronger than expressed above, as a person dealing with his own property may exercise prudence or not as he may choose. A trustee, however, must exercise the highest good faith, keeping ever in mind the interests

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of the beneficiary." Chief Judge Cardozo, in speaking for the Court of Appeals of New York said: "Joint adventurers, like copartners, owe to one another, while the enterprise continues, the duty of the finest loyalty. Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.*** thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court." And what we said in Wemple State Bank v. Continental Illinois Co., 279 Ill. App. 224-231, in discussing the law in relation to parties in business transactions, is somewhat applicable here. We there said that in a business transaction between parties, some cases sanction "puffing," "dealer's talk," or "opinion." But obviously, under the law, such conduct of trustees would not be sanctioned.

From the facts heretofore stated it appears that the property had been operated by the trustees since 1936. In 1938 it was appraised at \$65,743; in 1939 appraisers said it had a speculative value of \$82,000; and in 1941 the same committee found the speculative value of the property to be \$75,000. The trustees had received an offer of \$60,000 in 1941, and \$67,500 in September, 1943, which was increased to \$70,000 4 days thereafter and November 27, 1943, entered into the written agreement with the intervenor, Larson, to sell her the property for \$70,000 and she made a deposit of \$6,500 as earnest money. There was a reservation in the contract that the trustees might accept a higher offer if made within 20 days, etc., and that if they notified Larson of such higher offer and she would pay the higher amount, the property would be sold to her. The owners of the beneficiary certificates including plaintiff, were notified of the terms of the contract with Larson and December 29,

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plaintiff offered \$80,000. This was met by Larson and the action of the trustees, in agreeing to sell the property to Larson for this amount, was approved by the trustees and stockholders. In these circumstances we think the trustees acted fairly and honorably under the rule of law above stated, toward the beneficiaries and they were, to say the least, in honor bound to convey the property to Larson; and this too, although plaintiff filed the instant case on January 10, 1944, offering \$85,000. "A trustee is held to something stricter than the morals of the market place."

From what we have said we think it clear that the doctrine of Lis Pendens, which counsel for plaintiff seeks to invoke, is immaterial.

The decree of the Superior court of Cook county is affirmed.

AFFIRMED.

Niemeyer, P. J., and Matchett, J., concur.

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IN THE APPELLATE COURT OF THE
STATE OF ILLINOIS
Second District
October Term, 1944.

Ruth Marshall, formerly Ruth
Weaver, June Bye, formerly
June Sommonson, Blanche E.
Weaver, and Harry G. Weaver,
Plaintiffs-Appellants,

v.

The B. F. Goodrich Company, a
corporation,
Defendant-Appellee,
and
Max C. Hepler and Roy C. Voelz,
copartners doing business as
Liberty Drive Garage,
Defendants

Appeal from the
Circuit Court of
DuPage County

Dove, P.J.:

Appellants instituted a suit in the circuit court of DuPage County against the B. F. Goodrich Company, appellee, and others, to recover damages alleged to have been sustained on account of an automobile accident occasioned by the blowing out of a tire alleged to have been manufactured by The B. F. Goodrich Company, appellee, sold by the other defendants to Harry G. Weaver, one of the plaintiffs, and warranted by all of the defendants to be blowout proof. The cause is here by an appeal from an order of the circuit court denying a motion by the plaintiffs for a continuance, and dismissing the cause for want of prosecution. The grounds argued for reversal are, that the court erred denying appellants' two motions for an order requiring appellee to produce certain documents and records, and in denying each of two motions for a continuance and in dismissing the cause for want of prosecution.

The complaint, as amended on March 20, 1944, alleged that The B. F. Goodrich Company was the parent company of several subsidiary companies, among them the B. F. Goodrich Rubber Company; that the ~~latter advertised~~ latter advertised

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the kind of tire in controversy as blow out proof; that the subsidiaries, including the B. F. Goodrich Rubber Company, were dissolved; and that The B. F. Goodrich Company assumed all of the activities, assets and liabilities of the B. F. Goodrich Rubber Company, and continued to advertise such tires as blow out proof. The motions to produce documents and records are confined to documents and records showing the incorporation, change of name, date of dissolution, ownership of capital stock, and the assumption by the B. F. Goodrich Company of the activities, assets and liabilities of the B. F. Goodrich Rubber Company, all of which, as alleged in the amended complaint, is admitted by the amended answer of the B. F. Goodrich Company. The amended answer, filed on March 21, 1944, denies the alleged advertising of the tire as blow out proof, but neither of the motions to produce documents asks for any such as might relate to the alleged advertising. The matters that could be shown by the documents asked for in the motions being admitted by the defendant, such matters were not in issue, and needed no proof. There was no error in denying the motions to produce.

As to the alleged error in denying the motions for a continuance, the complaint alleges the tire was purchased on December 12, 1934, and that the accident occurred on September 13, 1935. Suit was originally filed on May 3, 1937, and plaintiffs were nonsuited on November 12, 1941. The complaint in the instant case was filed on December 4, 1941. The B. F. Goodrich Company was defaulted on January 27, 1942, the default was set aside on February 24, 1942, appellee's motion to dismiss the complaint, filed on the same day, was denied on December 28, 1942, and an answer to the complaint was filed on January 11, 1943. On March 18, 1943, the defendants filed a motion to place the cause on the April 1943 trial calendar, which was

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Section 201 of the Soldiers' and Sailors' Civil Relief Act of 1940, as amended, provides that a proceeding in which a person in military service is involved, either as plaintiff or defendant, shall, on the application of such person or some person on his behalf, be stayed as provided in the Act, (until sixty days after his discharge), unless, in the opinion of the court, the ability of the plaintiff to prosecute his action or the defendant to conduct his defense is not materially affected by reason of his military service. Harry G. Weaver, one of the plaintiffs, was in the military service from November, 1942, until November, 1945, when he was discharged. The cause was continued on December 15, 1943, to March, 1944, he appeared in court in person, which plaintiffs claim that in their desire to go ahead with the case, and no application was made by him or by anyone else on his behalf for a stay under Section 201, and no such application was made at any previous stage of the proceeding. Therefore, Section 201, now attempted to be invoked by plaintiffs, has no application here.

done, and on December 15, 1943, another order was entered placing the case as the first case for trial for the March 1944 jury.

On March 6, 1944, the plaintiffs filed a motion reciting that the cause had been continued to March 21, 1944, and asking that it be continued to the May 1944 jury. The motion alleged that Dr. Harry W. Kinne and Dr. William C. Perkins, both of Wheaton, Illinois, at the time of the accident, attending physicians of Ruth Marshall and Blanche E. Weaver, were in the United States Army, the former a Major in the Medical Corps, then on duty at Fort McIntosh, Laredo, Texas, and the latter a Captain in the Medical Corps, and was last on duty in England as a member of 201 Dispensary, APO #633, c/o Postmaster, New York, New York.

The motion alleged that both doctors are material and essential witnesses and are the only persons entirely familiar with the injuries, treatment and suffering of said plaintiffs; that on December 15, 1943, plaintiff Harry G. Weaver wrote to Captain Perkins, 55th Repair Squadron, APO #635, c/o Postmaster, New York, New York, advising that it was necessary and desirable to take his deposition in connection with the case, and inquiring the correct name of the organization to which he was assigned or attached, in order that the dedimus could be directed to the proper officer there; that on March 3, 1944, a reply was received from Captain Perkins, dated February 16, 1944, sent V-mail, stating that Mr. Weaver's letter had been received only a few days before, owing to Captain Perkins having been moved around quite a bit, and that he would be glad to cooperate in the matter. The motion, as shown by the abstract, further alleged that on December 18, 1943, a similar letter was sent to Major Kinne, at Fort McIntosh, and that on December 15, 1943, plaintiff Harry G. Weaver called at the Community Hospital,

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Geneva, Illinois, where the plaintiff Ruth Marshall was cared for and treated many months, in order to secure the hospital records relative to her, and was informed that such records had been delivered to Dr. Kinne for use in the trial of this case at a previous time when it was thought it could be tried; that on communicating with Dr. Kinne in reference to the hospital records a letter was received from him on or about March 1st stating that he was sorry to delay replying, but that he had been on a trip to the west coast in an army plane and had only recently returned; that the cabinet in which certain of his records were kept had been sold, but that his wife, who was then at Fort McIntosh, was of the opinion that the X-ray films taken of Ruth Marshall were at the doctor's home in West Chicago, Illinois, and that she thought she knew where they were and would make an effort to secure them and the hospital records at once. It is then alleged that pursuant to notice from Harry G. Weaver, under date of December 15, 1943, Ruth Marshall returned from California to and was then in Wheaton for the trial.

The motion then alleges notice on December 15, 1943, to defendants' attorney to admit certain facts, who stated that he had communicated with his client at Akron, Ohio, and as soon as he heard from his client would file whatever was appropriate and notify plaintiff without delay; that, not hearing from defendant's attorney, plaintiffs successively filed the motions for an order to produce documents above mentioned, on January 28, 1944 and February 17, 1944, which were denied, and that on March 3, 1944, plaintiffs served a notice on the defendants' attorney that on March 6, 1944, they would apply for a commission to take the depositions of the secretary and the director of advertising of the B. F. Goodrich Company, at Akron, Ohio, on March 20, 1944. The motion concludes with an allegation

"that beginning prior to December 15, 1943, they used every effort to secure admissions from the defendant to have the defendant produce certain documents in order to make out the essential elements of plaintiffs case and it was not until the second day of March, 1944, that plaintiffs learned that the statutory methods provided to accomplish this would not be available and it was necessary to serve three days notice of request for dedimus potestatum" and that the depositions could not be taken until March 20th, not in time for the trial on March 21st. Attached to the motion is an affidavit of Harry G. Weaver that the plaintiffs will be unable to make out a case without the information requested in the various motions filed, and their rights will be jeopardized unless the depositions of the two doctors mentioned and the hospital records are available.

The motion was denied, as was a similar motion filed on March 21, 1944, the day on which the suit was dismissed for want of prosecution.

Without prolonging this opinion unnecessarily, it is sufficient to observe that neither motion for a continuance states any fact to which either of the doctors would testify. ✓ and on the hearing on March 21, 1944, counsel for appellee stated, which was not denied, that on the hearing of the previous motion he told appellants' counsel in the presence of the court that if they would prepare an affidavit of what the doctors would testify to, he could probably admit it, and further indicated that the same situation still obtained. He further stated, which is also not denied, that he appeared with plaintiffs' counsel, on the pre-trial call on December 15, 1943, and the cause was continued because Mr. Weaver told the court that his daughter, Ruth Marshall, was in California and would not be able to leave until February. It is further to be

noticed that there is no showing of diligence in procuring a commission to take the depositions of the two officers of The B. F. Goodrich Company, but the motion shows the plaintiffs knew there would be no admission of facts when they filed their first motion for an order to produce documents, on January 28, 1944. No diligence is shown to obtain the hospital records, which the motion rather tends to show might be available by reasonable effort. As to taking the deposition of Dr. Kinne, the motion, so far as disclosed by the abstract, does not show that it could not have been taken at Fort McIntosh in ample time to be used on the trial. The letter from Dr. Kinne mentioned in the motion is apparently a reply to only the communication regarding the hospital records. The motion alleges Dr. Kinne was in the army since the summer of 1942, but does not disclose when Dr. Perkins entered the service. The instant case was filed in December, 1941. Plaintiffs therefore had about six months to take the deposition of Dr. Kinne before he went into the service. If they had no opportunity to take the deposition of Dr. Perkins before his induction into the army, the motion does not so allege. Supreme Court Rule 14, (Ill. Rev. Stat. 1943, chap. 110, par. 259.14), providing that it shall be a sufficient showing of diligence in seeking to obtain evidence that the absent witness is in the military service of the United States or of this State, manifestly does not apply to a want of diligence before the absent witness entered the military service. Furthermore, about a year and a half elapsed between the summer of 1942, and December 15, 1943, before plaintiffs made any effort to communicate with either of the absent witnesses regarding the taking of their depositions, and the case had meanwhile been placed on the April 1943 trial calendar. We do not think the statute was meant to apply to such obvious want of

diligence.

The fact that on the hearing of the second motion for a continuance, the court remarked; "You appeared before Judge Knoch and it would seem that that was in plenty of time to take depositions. All I know is what appears and I find a note here which says the trial of the case is not to be continued", does not indicate an abuse of discretion in denying the pending motion. It merely referred to the former motion and order. Under long established rules relating to the sufficiency of motions for continuance, the trial court correctly denied the motions, and the order denying the same and dismissing the cause for want or prosecution is affirmed.

Affirmed.

ACENTA NO. 9

OCTOBER TERM, A.D. 1944

MARGARET HARRIS,
APPELLEE,
vs.
ILLINOIS POWER COMPANY,
A CORPORATION,
APPELLANT.

HUFFMAN, J.

Appellant was operating one of its traffic buses east on Main Street in the City of Peoria. When the bus stopped to take on passengers at the intersection of Main and Jefferson Streets, appellee and two lady companions boarded the bus. The bus was crowded. The seats were all occupied. People were standing. Appellee and her friends remained standing. The scheduled route of the bus required that it turn south on Jefferson Street at this intersection. A driver of a passenger car had been trailing the bus as it approached this intersection, and came to a stop near the south curb

of Main Street, and at the rear of the bus as it made its regular stop for the intersection. The bus and the passenger car evidently started moving forward into Jefferson Street with the change in the traffic light. As the bus made its right turn on Jefferson, to the south, the passenger car which likewise was turning south, became trapped between the bus and the curb. When the operator of the bus discovered this situation and that the passenger car was wedged between the bus and the curb, he brought the bus to a sudden stop. There is no conflict in the evidence up to this point.

In the course of the events just above detailed, the appellee lost her balance and sustained an injury to her ankle. She was removed to the hospital where a cast was applied from the knee down. She remained in the hospital for approximately twelve days. Following her stay at the hospital, she was in bed for a week and thereafter in a wheel chair for a month. Following this period, she used crutches for some four or five weeks. The accident happened on September 1, 1943. It was about December 1st, when appellee ceased using crutches. The doctor states that the ligaments which sustain the arch of the foot had been torn. Trial resulted in a verdict for appellee in the sum of \$3,000. Appellant brings this appeal from judgment rendered thereon.

Appellant urges that the verdict is contrary to the evidence; that appellee failed to prove any negligence

on the part of appellant, which was the proximate cause of the injury; that the verdict is excessive; and that the court erred in refusing to give its fourth instruction.

Testimony on behalf of appellee is to the effect that the bus made a sharp turn into Jefferson Street, and immediately after such turn, a sudden stop due to its collision with the passenger car; and that at such time appellee was thrown from her position in such a manner as to cause the injury to her ankle and foot. This situation was properly a question of fact for the jury, with respect to the causes of appellee's injury.

Appellee was employed at the wage of \$100, per month. She states that she has not been able to resume work since the injury, although she made an effort to work. She was caused to employ a housekeeper during the period in which she was unable to walk about. Surgical care was \$134, and the hospital expense \$105.43.

It does not appear the jury was motivated by any improper impulses in assessing appellee's damages, and under the state of the record, we do not feel it can be considered excessive. Appellant's refused instruction No. 4, about which it complains, was an instruction consisting of sub-sections (a) (b) and (c) of Sec. 133, Article IV., Ch. 95 $\frac{1}{2}$ (Motor Vehicle Act, 1943 Ill. St.). These sections have to do with the duty of the operator of a motor vehicle which is involved in an accident result-

ing in injury or death to any person, to immediately or forthwith bring his vehicle to a stop at the scene of such accident or as close thereto as possible, and remain at the scene of such accident until he has complied with the requirements of the Act, by furnishing his name and address, registration number, etc. The manifest purpose and intent of the various sections of Article IV. of this Act, is to prevent one causing injury to leave the scene of the accident and thus escape identity. We are not of the opinion the refusal of the court to give such sections of this Act to the jury as were embodied in appellant's instruction No. 4, constituted error. Appellant was operating a public bus engaged in the transportation of passengers for hire, and although it would be the duty of the operator of the bus in the event of accident, to comply with the statute, yet appellant makes objection to the refusal of the instruction on the ground that it was the duty of the driver of this bus to bring it to an "immediate" stop, and that if such an immediate or sudden stop resulted in injury to appellee, that appellant was excused and exonerated from such injuries by virtue of his duty under the statute to bring the bus to an "immediate" stop.

As previously stated, it appears the question of the manner of appellant's operator in handling the bus, and the cause of appellee's injuries were questions of fact for the jury. We are unable to say that the verdict was the result of passion or prejudice, or that it should be considered so excessive as to justify disturbing it.

The judgment is therefore affirmed.

Gen. No. 10001

Agenda No. 10.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT.

OCTOBER TERM, A. D. 1944.

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| HOWARD PARKER, |) | |
| Appellant, |) | |
| vs. |) | |
| EVIN WOODARD, et al. as the BOARD |) | Appeal from |
| OF EDUCATION OF THE FAIRDALE |) | Circuit Court, |
| COMMUNITY HIGH SCHOOL DISTRICT |) | DeKalb County. |
| NO. 416, |) | |
| Appellees. |) | |

WOLFE,-- J.

Howard Parker, the appellant, filed in the Circuit Court of DeKalb County, a petition for a writ of mandamus against the defendants, the Board of Education of Fairdale Community High School District No. 416, in which he alleges that he lives in said High School District; that he had two children of High School age; that the High School was not a standard school, and therefore he sent his children to another high school. He asks that the defendants, the Board of Education of the high school district be compelled to pay the tuition of said children. Motions to strike the petitions were filed and were sustained. The action then was changed to a complaint for damages. A new complaint

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was filed as a supplemental amended complaint. The defendants entered a motion to strike the amended complaint.

The Court sustained the motions to strike the amended complaint, and entered the following order: "It is ordered that the motion of the defendants to strike the amended complaint to stand as motion to strike the second amended complaint as amended, and the motion to strike the second amended complaint as amended, is sustained; the plaintiff having elected to stand on the second amended complaint as amended." From this order, an appeal has been prosecuted and perfected to this Court.

Section 77 of the Practice Act, which is similar to our former Practice Act, provides that an appeal may be allowed to review a final judgment, order or decree of the Circuit Courts, and other Courts. The order appealed from is not a final order or judgment. Where the order appealed from is not a final order, this Court has no jurisdiction to review it. The Appellate Court, on being apprised of such facts, will of its own motion dismiss the appeal, although the appellee fails to move for a dismissal. *People vs. Banks*, 285 Ill. 137; *Routt vs. Newman*, 157 Ill. App. 242; *Daab vs. Ritter*, 294 Ill. App. 203; *Prange vs. The City of Marion*, 297 Ill. 353.

There being no final order, or judgment in the case, the appeal is therefore dismissed.

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C. G. SHERMAN, doing business
as Western Tree Company,
Plaintiff below.

FOLEY BROKERAGE COMPANY, a
corporation,
Appellant,

v.

SAM GORDON et al.,
Defendants below.

SAM GORDON,
Appellee.

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

MR. PRESIDING JUSTICE SULLIVAN DELIVERED OPINION OF THE COURT.

This appeal seeks to reverse a judgment order denying plaintiff's motion for certain relief and dismissing its complaint.

The original plaintiff, C. G. Sherman, filed a creditor's complaint against defendant, Sam Gordon, alleging that Sherman had recovered a judgment against Gordon for \$1,989.85 and \$32 costs; and that execution which had issued based upon said judgment had been served upon Gordon and that same had been returned no property found. The complaint also contained the usual allegations that defendant had equitable interests and choses in action, all of which should be applied to the payment of plaintiff's judgment and concluded with the usual prayer for relief. In Gordon's sworn answer to the original complaint he denied that he had any choses in action, listed all of the property that he admitted owning and asserted that the value thereof was less than \$400. In Gordon's answer to plaintiff's amended complaint he admitted that he owned certain choses in action hereinafter referred to. After filing a third amended complaint the original plaintiff assigned his rights herein to Foley Brokerage Company, which was substituted as plaintiff and subsequently filed a fourth amended and supplemental complaint on November 12, 1941.

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For a proper understanding of the questions presented for our determination it is necessary to make a rather detailed statement as to the essential phases of this litigation as they appear from the pleadings and orders entered by the trial court.

On June 27, 1939 Gordon, Feinstein & Co. and three others entered into a joint venture for the purpose of buying and selling watermelons. Gordon contributed \$4,500 to the joint venture, \$4,000 of which he had borrowed on his note from the Halsted Exchange National Bank (hereinafter for convenience referred to as the Bank.) Pursuant to the filing of the original complaint herein summons was served on Gordon on August 22, 1939. On October 5, 1939 Gordon received a check for \$2,250 from the joint venture as a partial return of the capital he had invested therein. On the same day he turned this \$2,250 over to the Bank in partial payment of the \$4,000 loan he had theretofore made from it. Also on the same day he executed and delivered a written assignment to the Bank of any remaining interest that he might have in the joint venture and in certain railroad claims growing out of same. The assignment, however, was limited in amount to the payment of the balance of Gordon's indebtedness to the Bank. Still on the same day, October 5, 1939, the Bank confessed judgment in the Municipal court of Chicago for \$4,282.50 on Gordon's note and thereafter on November 18, 1939 instituted a garnishment proceeding based on said judgment against Feinstein & Co., the latter answering that it owed Gordon \$293.68. On December 6, 1939 the joint venturers filed a suit in the Superior court in the name of Feinstein & Co., as their nominee, against the New York Central Railroad Company, in which damages of \$4,792.98 were claimed for loss sustained to watermelons turned over to the railroad company for shipment.

On December 6, 1939 the original plaintiff filed an

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On November 6, 1959 the original photograph was
company for shipment.

amended and supplemental complaint making Feinstein & Co., the New York ^{Central} Railroad Company and the Bank additional parties defendant, alleging therein all of the matters heretofore set forth and asking for injunctions restraining all of the defendants except Gordon from paying any funds to him, restraining the Bank from receiving any funds from Gordon, restraining the New York Central Railroad Company from paying any money to him, restraining Feinstein & Co. from disposing of any funds it might receive from the New York Central Railroad Company in behalf of the joint venture and restraining the Bank from taking any further action in its garnishment proceeding against Feinstein & Co. On December 12, 1939, all of the injunctions prayed for in said complaint were granted and a receiver was appointed herein.

On June 13, 1940 it was ordered by the trial court that Feinstein & Co., the nominee of the joint venturers, be granted leave to settle their claim against the New York Central Railroad Company for \$2,701.27, that Feinstein & Co. turn said sum over to the receiver, that the receiver pay therefrom \$675 as fees to the attorneys for the joint venturers in their suit against the railroad company and that the receiver retain in his hands the balance of such settlement, amounting to \$2,026.27, until the rights of the claimants to said fund were adjudicated and determined or until the further order of the court.

In plaintiff's prayer for relief in its fourth amended and supplemental complaint it asked that Gordon's assignment of October 5, 1939 to the Bank be set aside as to plaintiff, that the interest of the Bank therein be decreed to be subject to plaintiff's interest, that the Bank be decreed to pay the obligation of Gordon to plaintiff and be subrogated to plaintiff's rights after said payment, that the Bank be enjoined

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from receiving any money or property from Gordon or Feinstein & Co. until plaintiff's judgment against Gordon was paid, that the Bank be enjoined from proceeding further in the garnishment action in the Municipal Court, that the Bank be decreed to hold the \$2,250 received by it from Gordon subject to the rights of plaintiff and that "the Bank be required to pay any portion of said sum to plaintiff to satisfy any demand plaintiff might have against Gordon after the moneys in the hands of the receiver were paid out." Plaintiff's right to any of the relief sought by it against the Bank was contested by the latter, which claimed a prior right to both funds - the \$2,250 paid to it by Gordon and the \$2,026.27 in the hands of the receiver.

Without apprising the chancellor or Gordon of an agreement theretofore entered into between it and the Bank, which agreement will be hereinafter considered, plaintiff procured Gordon's approval of an order of distribution of the money in the hands of the receiver and procured the chancellor to enter said order by consent on October 8, 1942. That order is as follows:

"On motion of Oscar S. Seaver & J. Edward Jones solicitors for plaintiff on due notice to all parties in interest, and the Court having heard argument of counsel and being fully advised, IT IS ORDERED:

"1. The receiver Fred A. Clarke is hereby ordered to pay to Harold E. Sullivan, as Master, the sum of \$100 in full of fees and he is excused from filing a transcript of proceedings before him and from making any report in said matter.

"2. The receiver Fred A. Clarke is further ordered to pay to Halsted Exchange National Bank of Chicago the sum of \$250.00 instantan which sum shall be credited as partial payment on the judgment in the case entitled Halsted Exchange National Bank of Chicago versus Sam Gordon in the Municipal Court of Chicago in case No. 2784651.

"3. The receiver Fred A. Clarke is further ordered to pay to Oscar S. Seaver and J. Edward Jones, as attorneys for Foley Brokerage Co., the sum of \$1481.27 instantan which sum shall be credited as partial payment on the judgment in the case entitled Sherman vs. Gordon in the Municipal Court of Chicago in case No. 2781206.

"4. The receiver Fred A. Clarke is further ordered to pay himself the sum of \$25.00 as fees and expenses.

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"5. The said receiver is ordered to hold the balance of \$150 for disposition by Judge Finnegan."

On June 30, 1943 plaintiff presented a written motion, the following portion of which is germane to this appeal:

"That an order be entered compelling the defendant Sam Gordon to pay to the receiver the sum of \$2250.00 and restore the said sum which said defendant turned over to The Halsted Exchange National Bank of Chicago, a corporation, after the plaintiff's lien attached in this suit, said payment to be made within five days or within a time to be set by the court for said payment."

After a hearing on this motion the trial court entered the judgment order on October 19, 1943, from which this appeal is taken. The pertinent portions thereof are as follows:

"After the filing of this cause the plaintiff and other interested defendants, excepting the said defendant Sam Gordon, entered into the following agreement between themselves, without the knowledge in the first instance or consent of this Court and without notice to the said Sam Gordon:

"This agreement by and between Foley Brokerage Company, a corporation, party of the first part, and Halsted Exchange National Bank of Chicago, a corporation, party of the second part, witnesseth:

"Whereas, parties to this agreement are parties in the above entitled cause; and

"Whereas, the party of the first part has brought the above entitled proceedings and has sought to discover assets in the hands of Sam Gordon, Louis Feinstein and Feinstein and Co., Inc., a corporation, with which to satisfy its judgment against Sam Gordon, and funds in the amount of \$2006.27 are now in the hands of Fred A. Clarke, receiver appointed at the request of the plaintiff; and

"Whereas, there is a dispute as to the interest of the parties to the suit in the said funds and the party of the second part claims to have a prior right in said funds prior to the right of the party of the first part; and

"Whereas, the party of the first part has claimed to have a prior right in the sum of \$2250.00 paid by Sam Gordon to the party of the second part on to wit October 5th, 1939; and

"Whereas, the arrival at the exact amount due to each of the parties in the above entitled suit in the funds now held by said Fred A. Clarke would entail great expense in Master in Chancery hearings and other expenses which the parties hereto wish to avoid; and

"Whereas, party of the first part is willing to forego its claim against the party of the second part as to the \$2250.00 above referred to and to waive its claim as to \$250.00

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now in the hands of the Receiver in consideration of the party of the second part abandoning any and all claim to \$1756.27 of the funds now in the hands of said receiver.

"Now, Therefore, in consideration of the premises and of the mutual covenants of the parties hereto and of good and valuable consideration, receipt of which is hereby acknowledged by both parties,

"Party of the first part hereby abandons in favor of party of the second part any and all claim to \$250.00 of the funds now in the hands of the receiver Fred A. Clarke, in addition to the abandonment of \$150.00 in favor of Louis Feinstein and Feinstein and Co., Inc., a corporation, and also any and all claim to the sum of \$2250.00 paid to party of the second part on to wit October 5, 1939, by Sam Gordon and agrees not to seek any further recovery in law or equity against Halsted Exchange National Bank of Chicago, a corporation, for moneys arising out of the joint venture in watermelons in which Sam Gordon participated or in any other transaction in which Sam Gordon is alleged to have funds coming and party of the first part agrees to look to other persons or corporations for any funds which may belong to or which party of the first part may claim belongs to said Sam Gordon or in which the said Sam Gordon now has or may now claim any interest, legal or equitable, and the party of the first part will save the party of the second part harmless as to any costs in the above entitled case arising from the Master's proceedings and party of the first part waives any and all costs which it might otherwise seek to have taxed against the party of the second part.

"Party of the second part waives and abandons all its claims in favor of the party of the first part to the sum of \$1606.27 now in the hands of the receiver and in favor of Feinstein and Co., Inc., a corporation, and Louis Feinstein, the further sum of \$150.00 now in the hands of said receiver, and agrees not to seek any further recovery against party of the first part for any money it may claim against Sam Gordon and agrees to look to other persons and corporations for the payment or settlement of said claim against Sam Gordon.

"The parties hereto do not release any claims which they have or may claim to have against Sam Gordon but reserve all said rights.

"The agents of the parties executing this agreement for their respective principals warrant that they have due and lawful authority to execute this said agreement.

"Foley Brokerage Co., a corp.

"By J. Edward Jones

"Halsted Exchange National Bank
of Chicago, a corp.

"By W. J. Mahoney"

"Under this agreement the said plaintiff abandoned its hold or claim on the \$2250.00, paid by Sam Gordon to the Halsted Exchange National Bank on or about October 5, 1939, and by the terms of said agreement agreed to accept the sum of \$1756.27 in the hands of the receiver.

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"By its own action the plaintiff has defeated its lien or claim to the \$2250.00, and now asks that defendant, Sam Gordon, again pay said sum to the receiver.

*** The plaintiff having by its own action, by agreement, releasing his claim or hold on the \$2250.00,

"It Is Ordered that *** the motion to require Sam Gordon to again pay the sum of \$2250.00, or any portion of it, to the receiver is denied.

"By virtue of the premises the suit herein is dismissed at no costs, all costs having been paid.

"Plaintiff excepts to this order.

"Enter: Philip J. Finnegan
Judge of the Circuit Court
of Cook County."

This then is the situation presented here. The filing of plaintiff's creditor's complaint and the service of summons on Gordon pursuant thereto on August 22, 1939 constituted an equitable levy on all choses in action that Gordon owned on that date, subject, however, to the prior rights of other claimants, if any, in and to such choses in action. Two funds were thereafter created from moneys received by Gordon or for his benefit from the watermelon venture. The first was the \$2250 which Gordon received from said venture and paid to the Bank on October 5, 1939 and the second was the net amount of \$2,026.27 received by the receiver as the result of the settlement of the joint venturers' claim against the railroad company. Both of these funds were admittedly within the control of the trial court. Ever since their discovery or creation plaintiff diligently and persistently pursued these funds to enforce its claimed prior lien on and right to the money in such funds or at least to such portion thereof as was necessary to satisfy its judgment against Gordon.

Plaintiff having failed to include in the record the Bank's answer to its complaint, we are not advised as to the nature of the Bank's claim to a prior right to said funds but the settlement agreement heretofore referred to between plain-

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the Commission has not yet received any information
from the Government of the United States regarding
the results of its investigation.

The second of these is the fact that the
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tiff and the Bank, which is set forth in full in the judgment order, declared that "there is a dispute as to the interest of the parties to the suit in the said funds and the party of the second part [Bank] claims to have a prior right in said funds prior to the right of the party of the first part [plaintiff.]" Under the terms of said agreement plaintiff abandoned and waived its claimed right to the \$2250 fund in the hands of the Bank and as a result of the agreement the Bank was permitted to retain the \$2250 and to receive \$250 from the fund in the hands of the receiver, while plaintiff received \$1481.27 from the latter fund. While it is true that the distribution of the fund in the hands of the receiver was approved by the entry of a consent order by the trial court, it is also true that when said order was entered, neither Gordon nor the chancellor was apprised of the agreement between plaintiff and the Bank, whereby they settled as between themselves all the issues pending before the court. It was about nine months after plaintiff had received the \$1481.27 from the fund in the hands of the receiver that it filed its motion in the trial court to compel Gordon to restore the \$2250 fund, which he had theretofore paid to the Bank and as to which plaintiff in the settlement agreement had abandoned its claimed prior right as against the Bank.

As heretofore stated, the nature of the Bank's claimed prior right to the \$2250 fund does not appear from the record. The question as to whether plaintiff or the Bank had the prior right to that fund was one of the issues pending before the chancellor. ^{While} plaintiff and the Bank could enter into any agreement they pleased in so far as their own rights were concerned, they could not make any agreement without Gordon's knowledge and consent that would affect his rights detrimentally.

It was Gordon's money that created the \$2,250 fund in the hands of the Bank. That fund was within the control of the court and the settlement agreement between plaintiff and the Bank deprived Gordon of his right to a judicial determination as to whether his payment of that money to the Bank was made properly or improperly. If plaintiff's compromise agreement with the Bank had not deprived Gordon of said right and it was determined by the chancellor that the \$2250 was properly paid to the Bank, then Gordon would have been relieved of any obligation to account to plaintiff for the \$2250 or any part thereof, and if, on the other hand, it was determined that Gordon improperly and wrongfully paid the \$2250 to the Bank, the latter would have been directed to restore and pay to the receiver as much of said fund as was necessary to satisfy the unpaid portion of plaintiff's judgment against Gordon. Thus, regardless of how the issue between plaintiff and the Bank as to their respective claimed prior rights to such fund might have been decided, Gordon would have been absolved from any further obligation to plaintiff in respect to his payment of the \$2250 to the Bank.

We think that by reason of plaintiff's conduct and the method of procedure adopted by it, whereby Gordon was deprived of his right to a judicial determination of the question as to whether the \$2250 was properly or improperly paid by him to the Bank, plaintiff is estopped from asserting the claim it now makes that Gordon should be compelled to restore said amount and pay it to the receiver.

For the reasons stated herein we are impelled to hold that the trial court did not err in entering its judgment order denying plaintiff's motion to compel Gordon to restore the \$2250 and dismissing plaintiff's complaint, and that under the circumstances disclosed herein it would be against

equity and good conscience to compel Gordon to restore the fund in question or any part of it.

Gordon heretofore filed a motion, which was reserved to hearing, to include in the record certain pleadings. These pleadings not being pertinent to any question before us for determination we had no occasion to consider them and the motion to include same in the record will be at this time denied.

The judgment order of the Circuit court of Cook county is affirmed.

JUDGMENT ORDER AFFIRMED.

Friend and Scanlan, JJ., concur.

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HARRY PAUL SZALACHA, Administrator
of the Estate of Peter Siemrzych,
deceased,

Appellee,

v.

LOUIS LANDSMAN,

Appellant.

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

MR. PRESIDING JUSTICE SULLIVAN DELIVERED OPINION OF THE COURT.

This action was brought by Harry Paul Szalacha, administrator of the estate of Peter Siemrzych, deceased, to recover damages from defendant, Louis Landsman, because of the latter's alleged negligent conduct in striking plaintiff's intestate with his automobile and thereby inflicting injuries upon him which resulted in his death. The jury returned a verdict finding defendant guilty and assessing plaintiff's damages at \$7,000 and judgment was entered on the verdict. Defendant appeals.

It should be stated at the outset that, although Landsman's defense upon the trial was that his automobile did not strike the decedent and his counsel insisted in his original brief filed in this court that "he was involved in no collision with the decedent but that he came upon the scene after the decedent had been struck," he is precluded from asserting on this appeal that his car did not strike Siemrzych. At defendant's request the trial court submitted to the jury the following special interrogatory: "Did the automobile of the defendant, Louis Landsman, strike the deceased, Peter Siemrzych, as he was crossing Logan Boulevard and knock him to the ground?" The jury returned an affirmative answer to this interrogatory and, since defendant did not question the correctness or propriety of the jury's finding in this regard in his motion for a new trial or otherwise, he is conclusively bound by it.

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(Voight v. Anglo-Amer. Prov. Co., 202 Ill. 462; Rubottom v. Crane Co., 302 Ill. App. 58.)

At 12:30 A. M. on December 24, 1942 Peter Siemrzych was found lying on Logan boulevard about 35 feet west of the west crosswalk of Holly street with his head 4 feet north of the center line of Logan boulevard and the rest of his body extending northward. He was semi-conscious, mumbling and bleeding from the forehead. There was no evidence of liquor on him. He was taken to a hospital where he died the same day. An autopsy was performed on his body. The coroner's physician testified that the decedent's scalp was almost torn from his head, that he had a large contusion at his right hip, that his entire right chest was fractured and caved in, that his liver and right kidney were ruptured and that the right side of his chest was covered with bruises.

Logan boulevard runs in a southwesterly and northeasterly direction but for convenience we will refer to it as an east and west street. It is intersected by Holly street which runs north and south. Logan boulevard is 50 feet 4 inches wide from curb to curb and Holly street is 38 feet wide from curb to curb. There were lights on the northeast and southwest corners of this intersection. The weather was clear and the visibility good on the night in question.

Martin Pearson testified on plaintiff's behalf that at about 12:30 A. M. on December 24, 1942 he was driving west on Logan boulevard about 30 or 35 yards behind defendant's car; that he saw a man about the "middle" of Logan boulevard walking north on the west crosswalk of Holly street; that the man was about 35 yards west of defendant's car when he saw him; that he (Pearson) dropped his eyes momentarily to the dashboard of his car and upon looking up saw defendant's car swerve to the left and later stop after going 40 or 50 feet; that he then saw

defendant get out of his car and go back to where Siemrzych was lying on the street; that when he looked up from his dashboard he did not see the man on the crosswalk, whom he had previously seen walking north across Logan boulevard, and did not see defendant's car come in contact with anything at all on the street; that defendant's automobile was traveling 20 or 25 miles an hour; that in so far as he recalled the lights on defendant's car were burning; and that Logan boulevard was a well lighted street.

Defendant's counsel sought to impeach Pearson by showing that he testified at the coroner's inquest that he saw a dark object crossing the street "in the middle of the block." Pearson explained his prior testimony in this regard by stating that he was then referring to the middle of the block between Elston avenue and Western avenue and that he "considered that between Elston avenue and Western avenue always was a big block to me." Holly street was between Elston avenue and Western avenue, being about 200 feet west of Elston avenue. In any event Pearson's impeachment could only affect his credibility and that was a question for the jury to determine.

Over defendant's objection plaintiff, Harry Szalacha, who was decedent's stepson, was permitted to testify as follows: "Q. And during the many years that you knew him [Siemrzych], had you had an opportunity to observe him and what his habits were in crossing the streets in the City of Chicago where autos had occasion to pass? A. Yes, I observed many times. From the time I was a child on up. Q. And what were his habits as to due care, Harry? A. He was always very careful when crossing."

Shortly after defendant alighted from his car two police officers of the Chicago Park District arrived on the scene. One of them testified that as they were driving west

on Logan boulevard he saw the object (Siemrzych) on the street when he was about 400 feet east of it. Defendant and others were standing near the decedent when the policemen drove up and in response to a query by one of the officers Landsman said, "I don't know whether I am responsible or not" and he told another police officer that he did not feel any bump - "so I do not know if my car struck this man."

It appeared that decedent visited his brother's home on the night of December 23, 1942, that he had a basket with him containing various groceries and meats and that he left his brother's home about 9:30 or 10 P. M. It also appeared that, after the police officers had wrapped Siemrzych in a blanket and were waiting for the ambulance, they found freshly scattered flour on the west crosswalk of Holly street approximately 5 feet south of the north curb of Logan boulevard and strewn diagonally toward said north curb, some of the flour extending 7 or 8 feet west of the west crosswalk of Holly street; and that they also found canned goods in that area and more canned goods and groceries scattered on Logan boulevard from the point where they found the flour to about where decedent's body was lying in the street.

At the time of his death Siemrzych was 57 or 58 years old. He was in good health and his hearing and eyesight were perfect. He was employed as a janitor in a garage at a salary of \$25 a week and he earned an additional \$10 weekly doing odd jobs. He was a widower and left surviving him two minor children, a daughter 15 years old and a son 10 years old. These children lived with him and he supported them.

The defendant, Louis Landsman, testified in substance that he was driving his automobile west on Logan boulevard at about 12:30 A. M. on December 24, 1942; that as he reached a point west of the intersection of Logan boulevard and Holly

street he noticed something lying in the street; that he swerved his car to the left and then back to the right; that he stopped his car about 50 feet west of the object he had seen in the street; that he was driving at a speed of 25 miles an hour or possibly less; that he did not at any time feel any jolt or jar "as though my car had struck anything at all"; that after he stopped he and some others who were riding with him got out of his car and went back to the point where he had seen the object in the street; and that he then saw that it was a man.

Defendant testified on cross-examination that his "city lights" were turned on and he believed that they would throw a beam about 50 feet ahead; that as far as he knew there were no other cars ahead of his automobile going in either direction; that he could not recall whether the wheels of his car touched the man or not; and that he did not know whether he was responsible for the accident.

Defendant's wife who was riding on the front seat with him testified that their car was the only automobile going west on Logan boulevard "for quite sometime"; that her husband suddenly "swung" the car to the left and then brought it to a stop and got out; that prior to that time "we had felt no jolt or bump at or about the car at all"; and that she did not see anything on the street at the time her husband swerved the car or at any other time before she got out of same and went back to where decedent was lying on the street.

Defendant's 14 year old son, Stewart Landsman, who was riding in the rear seat of his father's automobile, testified substantially to the same effect as his mother.

The only other witness who testified on defendant's behalf was a court reporter who took and transcribed the testimony of the witnesses at the coroner's inquest. His testimony related to certain differences between the testimony of plain-

tiff's witness Pearson upon the trial and that given by him at the coroner's inquest.

Notwithstanding that under the record in this case it must now be considered that defendant's car struck the decedent, it was incumbent upon plaintiff to prove that Siemrzych was in the exercise of reasonable care for his own safety at and immediately prior to the time he was hit by said car, that defendant was guilty of negligence in the operation of his automobile and that his negligence was the proximate cause of decedent's injuries and resulting death.

Defendant first contends that the verdict was against the manifest weight of the evidence.

With Landsman's sole defense, that his car did not strike the decedent, out of the case, it hardly seems necessary to discuss this contention in view of the evidence heretofore set forth. It should be noted in passing that even Landsman's testimony did not entirely support his counsel's theory of fact in the trial court. The most significant thing about his testimony is that he did not know whether or not his car struck the decedent.

One of the charges in the complaint is that defendant "operated his automobile carelessly and negligently without keeping a reasonable lookout ahead for persons in and about said intersection." This allegation of negligence on the part of the defendant is amply supported by the evidence. Here we have the decedent walking north across Logan boulevard on the west crosswalk of Holly street. Logan boulevard is a little more than 50 feet wide and he was about half way across the street when defendant's car was approximately 100 feet east of him. It was a clear night and the visibility was good - so good that one of the police officers driving west on Logan boulevard saw an object lying on the street when he was about

400 feet east of it. This object was the decedent. The intersection was well lighted and Logan boulevard was well lighted. There were no cars going west on Logan boulevard ahead of defendant's car for "quite sometime" and there were no cars coming east toward him. Defendant had a clear and unobstructed view west on Logan boulevard as he approached and reached the intersection from the east. According to defendant he was traveling at a speed of not more than 25 miles an hour. That the defendant's car struck the decedent on the west crosswalk of Holly street is conclusively demonstrated by the presence of the flour and corned beans, which he had been carrying, on and immediately adjacent to said west crosswalk. The evidence does not disclose just how far to the north of the center line of Logan boulevard the decedent had proceeded before he was struck by the car but from the position of the flour on the crosswalk - 5 feet south of the north curb of Logan boulevard and extending north to said curb - it is reasonable to infer that he had walked at least half way across the north half of the roadway before the car hit him and that a few more steps would have brought him safely to the curb. That the decedent was walking in an upright position with his right side toward the east when he was struck is demonstrated by the nature of his injuries as heretofore set forth. While it makes no difference, in so far as the proof of defendant's negligence is concerned, whether his automobile hurled the decedent 35 feet west of the crosswalk when it struck him or whether, after he was struck, he was caught on or by some part of the car and carried or dragged 35 feet to the west and then dropped to the street, we think that it is highly probable that he was so carried or dragged for 35 feet and that defendant saw him for the first time when he dropped to the street.

Since the decedent was unquestionably walking north

on the west crosswalk of Holly street as defendant approached the intersection from the east and since the weather was clear, the visibility good and the intersection well lighted, Landsman was bound to see the decedent if he had been maintaining a proper lookout. The only reasonable conclusion that can be drawn from the evidence is that defendant not only did not keep a proper lookout but that he was not looking ahead at all as he approached the intersection and the west crosswalk of Holly street. The decedent was rightfully upon the crosswalk and the law imposed no duty on him to anticipate that defendant would operate his automobile in a negligent manner. If defendant had exercised even the slightest degree of care, he could have avoided striking the decedent with his automobile.

Plaintiff's complaint also charged that defendant was negligent in driving his car in violation of section 74(a) of the Uniform Act Regulating Traffic on Highways (Par. 171, chap. 95-1/2, Ill. Rev. Stat. 1941), which provides as follows:

"Where traffic control signals are not in place or in operation the driver of a vehicle shall yield the right-of-way, slowing down or stopping if need be to so yield, to a pedestrian crossing the roadway within any marked crosswalk or within any unmarked crosswalk at an intersection ***."

There were no traffic control signals at the intersection of Logan boulevard and Holly street. It will be noted that this statute imposed the duty upon defendant to slow down or even stop if necessary to permit the decedent, under the circumstances shown herein, to cross Logan boulevard safely. There can be no question but that defendant's violation of this statute constituted negligence on his part.

This brings us to the consideration of the question as to whether the evidence shows that the decedent was in the exercise of reasonable care for his own safety at and immediately prior to the time he was struck by defendant's automobile. There was no eyewitness to the decedent's injury and it is conceded

that it is the rule in this state that where there is no eyewitness to a fatal accident the exercise of due care by the deceased may be shown by testimony as to his careful habits. In discussing this rule in C. & A. Ry. Co. v. Wilson, 225 Ill. 50, the court said at p. 53:

"The contention that evidence introduced on behalf of the plaintiff as to the careful habits of the deceased was incompetent and improperly admitted over the defendant's objection is without force. As we have already stated, no one witnessed the accident, and the testimony objected to was competent as tending to show that the deceased was at the time in the exercise of due care. Due care may be shown by circumstances as well as by direct testimony, and the fact that the deceased, at the time of the accident, was not guilty of negligence may be shown by her habits and by what are known to be the instincts of self-preservation in persons possessed of their natural faculties and who are ordinarily sober and careful of their personal safety."

In the absence of evidence to the contrary and there was no evidence to the contrary in this case, the testimony as to the decedent's careful habits coupled with his instincts of self-preservation was sufficient to warrant the jury in finding that Siemrzych was free from contributory negligence.

Defendant next contends that "the court erred in admitting in evidence testimony of the careful and cautious habits of the decedent in crossing streets." In support of this contention it is argued that Pearson was an occurrence or eyewitness and that therefore the testimony as to decedent's careful habits was not admissible. But Pearson was not an eyewitness. When he saw the decedent, the latter was in a position of safety at about the "middle" of Logan boulevard walking north on the west crosswalk of Holly street and at that time defendant's car was about 100 feet east of said crosswalk. Pearson's attention was then diverted to the dashboard of his car and when he again looked up and to the west defendant's car was some distance west of the intersection. Pearson did not profess to know the circumstances

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under which the decedent was struck by defendant's car and, that being true, he did not and could not testify as to the conduct of the decedent or the defendant in respect to the due care or want of due care of either of them at and immediately prior to the time Siemrzych was struck. Defendant cites several authorities which it is claimed support his instant contention. We have carefully examined all of the cases cited and in not a single one of them is there a situation involved where, as here, there was definitely no eyewitness to the occurrence. In our opinion the testimony as to the careful habits of the decedent was properly admitted.

Defendant further contends that "the final argument of plaintiff's counsel to the jury was improper and prejudiced the defendant in the eyes of the jury." In the closing argument to the jury of plaintiff's counsel the following occurred:

"Mr. Dooley: And where is he [defendant] now?

Mr. Vogel: Wait a minute. I object to that, if the court please, as highly improper and prejudicial. The Court: Objection sustained. The jury will disregard the last remark of counsel. Mr. Dooley: Where has he been during this trial?

Mr. Vogel: I object to that, if Your Honor please, highly prejudicial. The Court: Sustained. Mr. Vogel: Wait a minute.

I want the jury instructed to disregard the statement. The

Court: The objection is sustained and the jury will disregard that statement. Mr. Dooley: Ladies and gentlemen, if you were

being accused of running down someone, where would you be when

the case was on trial? Mr. Vogel: If the court please, I object

to this line of argument as highly prejudicial to the defendant.

I have a motion to make. The Court: The jury will disregard the statement of counsel."

In denying defendant's motion for a new trial the trial judge made the following statement in reference to the assignment

The following information was obtained from the records of the Bureau of Prisons:

On June 10, 1968, the following information was received from the Bureau of Prisons:

of error based upon the foregoing portion of the argument of plaintiff's counsel:

"Much of counsel's brief is gone into remarks by counsel for the plaintiff in his closing argument. These remarks revolve around the failure of the defendant to be present in the court room during the trial. The record will show that these statements and objections were sustained and the jury specifically instructed to disregard it. Furthermore, by one of the given instructions, the jury was told to disregard any remarks of counsel to which an objection had been sustained.

"I was of the opinion that the remarks of plaintiff's counsel had no place in the argument and I am still of that opinion. *** I cannot say that the remarks of counsel had the effect upon the jury as counsel for the defendant claims."

We are not unmindful of the rule that a new trial should be granted when counsel oversteps the bounds of propriety in his argument by indulging in inflammatory language for the purpose of arousing the passions and prejudices of the jury but it is also the rule that, even though counsel's argument is of an improper nature, it is not sufficient cause for reversing a judgment unless it was of such a character as was likely to prejudice the defeated party. (Appel v. Chicago City Ry. Co., 259 Ill. 561.)

While the reference to defendant's absence from the court room "had no place" in the argument of plaintiff's counsel, as the trial judge stated, we fail to perceive how such reference did or could have the prejudicial effect on the jury which defendant attributes to it. It merely called the attention of the ^{jurors} ~~jury~~ to something that they must have already observed themselves. The language used was neither inflammatory nor vituperative and we are in accord with the

opinion of the trial judge that it could not be said that "the remarks of counsel had the effect upon the jury as counsel for the defendant claims." We think that the aforesaid portion of the argument of plaintiff's counsel was not of such a character as was likely to prejudice the defendant or to warrant the reversal of the judgment of the trial court.

Defendant also complains of the following statement made by plaintiff's counsel in his argument to the jury:

"And I submit there should be a finding of guilty on the general verdict and a finding of 'yes' on the special interrogatory to the effect that the car of Louis Landsman struck Peter Siemrzych for the simple reason that Louis Landsman has not proven otherwise."

Defendant's counsel objected to this statement on the ground that it placed upon defendant the burden of proof. The objection was overruled. The court erred in this regard but we are of opinion that the error was harmless, inasmuch as the jury was properly advised in five separate instructions, four of which were submitted by defendant, as to what the law was governing the burden of proof. We are convinced that the foregoing statement was inadvertently made and that the jury was not misled by it.

Plaintiff's motion, heretofore made and reserved to hearing, to strike certain portions of defendant's brief is at this time denied.

For the reasons stated herein the judgment of the Circuit court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Friend and Scanlan, JJ., concur.

45163

COLE STEEL EQUIPMENT CO., INC.,
Appellee,

v.

SPITZER'S OFFICE FURNITURE HOUSE,
INC.,
Appellant.

APPEAL FROM MUNICIPAL

COURT OF CHICAGO.

MR. PRESIDING JUSTICE SULLIVAN, DELIVERED OPINION OF THE COURT.

This action, which was tried by the court without a jury, was brought by plaintiff, Cole Steel Equipment Co., to recover \$165.81 for merchandise sold and delivered to defendant, Spitzer's Office Furniture House. Defendant filed a counterclaim alleging that it entered into a contract with plaintiff, whereby the latter agreed to deliver to it certain merchandise at an agreed price, that plaintiff refused to deliver the merchandise and that by reason of such refusal defendant "was required to and did go out into the open market and purchase the said merchandise and paid therefor a sum of \$273.62 in excess of the amount for which the counterdefendant had contracted to deliver the same." Judgment was entered for \$165.81 in favor of plaintiff on its statement of claim and against defendant on its counterclaim. Defendant appeals.

Since defendant admitted in its affidavit of merits that it owed plaintiff \$165.81 as averred in the latter's statement of claim, we are concerned only with the alleged contract between the parties which is the subject matter of the counterclaim.

Plaintiff's home office was in New York city and it had a branch office in Chicago. Joe Roth was plaintiff's office manager and sales manager in Chicago. A few days prior to August 14, 1942 one of defendant's employees requested Roth to come to its office. When he arrived, he

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was advised that defendant had an inquiry from the United States Army concerning the price of filing cabinets the army desired to purchase and Roth was asked to quote a price to defendant and advise it as to when plaintiff could deliver such filing cabinets. Roth testified that because it was a "large quantity" order he quoted defendant a price, allowing it a "better than average discount [50-10-10% from list prices instead of 50-10%]," and assured defendant that plaintiff had in stock in its New York plant sufficient filing cabinets to meet defendant's requirements and that same were available for immediate delivery. Based on the price quoted by Roth and his assurance of immediate delivery defendant submitted its bid to the army, which was accepted. On August 14, 1942 typewritten orders for the purchase of the filing cabinets from plaintiff were prepared by an employee of defendant in Roth's presence at the price theretofore quoted by him. The orders were given to Roth, he took them to his office the same day, mailed them to plaintiff's New York office and left the city on a 17 day vacation the following day.

The filing cabinets not having been delivered by plaintiff within one week as stipulated in the orders, defendant attempted to contact Roth but was unable to do so because he was away on his vacation. Then according to the testimony of the president of the defendant company he made several long distance telephone calls to plaintiff's New York office to ascertain why the merchandise was not delivered and no one in authority in said office would talk to him or return his calls.

Defendant wrote plaintiff a letter on August 27, 1942 and received the following reply thereto:

1. The first part of the report
describes the general situation
of the country.

2. The second part of the report
describes the situation in the
different regions of the country.
The third part of the report
describes the situation in the
different departments of the country.

3. The fourth part of the report
describes the situation in the
different provinces of the country.
The fifth part of the report
describes the situation in the
different districts of the country.

4. The sixth part of the report
describes the situation in the
different counties of the country.
The seventh part of the report
describes the situation in the
different parishes of the country.

5. The eighth part of the report
describes the situation in the
different manors of the country.

6. The ninth part of the report
describes the situation in the
different lordships of the country.

"August 28th, 1942

"Spitzer's
"107 Lake St.
"Chicago, Ill.

"Gentlemen:

"We received your special delivery air mail letter dated August 27th and wish to call your attention to a letter we sent you dated August 15th, which read as follows:

"We received the attached orders for a large assortment of wood card cabinets to be shipped directly to the various army airbases. We notice the discount is 50-10-10% FOB New York City. It is a very large order and assure you, most tempting, but we are in no position to allow so large a discount. If we could, rest assured you would be quoted 50-10-10% originally.

"The extreme discount on these wood card cabinets is 50% off FOB New York City. Thanking you for the opportunity, we remain.

"We attached orders to the letter which was written as above. It is very unfortunate, if you did not receive notice from us that we were not filling your order. We, would accept no order having a penalty clause attached to the order because of uncertain conditions in the wood manufacturing field.

"Yours very truly,

"S. T. Scheinman

"PRONTO FILE CORP.
"S. T. Scheinman, Pres."

It will be noted that this letter is signed by Scheinman as president of "Pronto File Corp." It was agreed upon the trial that Pronto File Corporation and plaintiff, Cole Steel Equipment Co., might be considered as the same company.

Defendant admitted receiving the foregoing letter but denied that it received the purported letter of rejection of August 15, 1942, the contents of which are quoted in plaintiff's letter of August 28, 1942.

It is undisputed that upon plaintiff's refusal to deliver the filing cabinets defendant was compelled to purchase merchandise of the same character in the open market in order to fulfill its contract with the army and to pay therefor \$273.62 in excess of the price quoted by Roth.

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The only real question presented for our determination is whether Roth had authority to enter into the alleged contract with defendant on plaintiff's behalf. That Roth was plaintiff's agent was admitted but it was still incumbent upon defendant to prove the extent of his authority and especially that he had authority to sell plaintiff's merchandise to it at a discount larger than that ordinarily allowed.

Defendant contends that "the evidence established a completed contract for the purchase of the merchandise in question" and that "there could be no question but that under this record, the witness Joe Roth was the duly authorized agent of the plaintiff with authority to quote prices and accept orders." In support of these contentions defendant relies particularly on the testimony of Roth, then called as a witness by it under Section 60 of the Practice Act (par. 134, chap. 110, Ill. Rev. Stat. 1943), that in August, 1942 he was employed by plaintiff which had its principal place of business in New York city; that he was the office manager and sales manager at its Chicago office; that defendant had an inquiry from the United States Army concerning the purchase of filing cabinets by the latter; that he was requested to and did give defendant a price on such filing cabinets, but stated that he would have to contact his principal office in New York as to delivery date; and that "he would accept the order" and informed defendant that if plaintiff could not meet the delivery date it would notify him. It also strongly relies on the following testimony given by Roth when called as a witness by plaintiff: "They asked me if we were in a position of making delivery and I said that we were. We discussed price and I gave them a price and that was the end of it. I mentioned a discount to them after the amount involved was mentioned to me; in other words, for the amount they were buying

I told him what discount I could give, which was a better than average discount, due to the fact that it was a large quantity order."

If Roth's authority to accept defendant's orders on plaintiff's behalf at the price quoted by him was shown by his testimony when called as a witness by plaintiff, the latter would have been bound by such testimony but there is nothing in his above quoted testimony, nor in any of his testimony as plaintiff's witness that tends to show the extent of his actual authority. Defendant merely assumes that it does but Roth's testimony as plaintiff's witness consists of nothing more than a recital of his discussion with defendant's representatives concerning prices, discounts and delivery and of what he said to them regarding same. The same is true as to Roth's testimony when called as a witness by defendant and it should be added that he was the only witness called by either side whose testimony could possibly be considered as having any bearing on the question of his authority as plaintiff's agent to bind it as a party to the alleged contract. There is not a particle of evidence in the record to show what Roth's actual authority was as plaintiff's agent.

This brings us to the consideration of the question as to whether defendant proved that Roth had apparent authority to enter into the alleged contract with defendant on plaintiff's behalf.

The only previous experience defendant had with Roth as plaintiff's agent was in connection with over-the-counter sales or pick-up orders of merchandise from the small stock which plaintiff carried in its Chicago office and it is conceded that there was nothing in that experience that has any bearing on the controversy in this case. It is not claimed herein that there was even a single precedent act or transaction

upon which could be asserted a course of conduct manifesting Roth's apparent authority to enter into the purported contract.

The only evidence in the record that may be considered as tending to prove that plaintiff clothed Roth with or held him out as having apparent authority to enter into the alleged contract on its behalf is that it designated him as office manager and sales manager of its Chicago office. What then is the probative force of the circumstance that plaintiff bestowed such titles on Roth as to his apparent authority and what is the proper significance to be given to them? In a discussion of this question in section 91 of Vol. 2, C. J. S., it is stated at p. 1183: "Fundamentally, the true scope and extent of the agent's mandate is governed by the extent of the powers and duties actually or ostensibly entrusted to him, uncontrolled by the designation which may be given him, and only affected thereby in so far as such designation is a circumstance tending to show what powers are his." It is also stated in said section that "this is true although * * * the name or title given an agent is at times a material circumstance in the determination of the appearance of authority bestowed on the agent * * *, this quasi-evidentiary force being all the significance which the factor of name or title possesses." Thus at times the name or title given an agent may be a material circumstance in the determination of the appearance of authority bestowed on him, while at other times it may be an immaterial and insignificant circumstance, wholly insufficient, standing alone, to prove the extent of an agent's apparent authority. Numerous authorities might be cited to the effect that, where one conducts a business to which the services of a manager are essential and he does not himself act as manager, there is a representation that the person performing the duties of manager is the agent of the

owner with power to bind him for acts necessary in conducting the business or acts incidental thereto. Under such circumstances the acts and decisions of the manager in the conduct of the business would be just as binding on the owner of same as if they were his own acts and decisions. Here an entirely different situation is presented.

Defendant knew that plaintiff carried only a small stock of merchandise in its Chicago office; that the filing cabinets it ordered would have to be delivered from plaintiff's New York office or plant; and that the only employee in plaintiff's Chicago office other than Roth was a clerk who took care of the office and made sales from the small stock of merchandise contained therein during Roth's absence. Defendant certainly placed no reliance at the time of the transaction involved herein on Roth's title as office manager as giving him the appearance of authority to bind plaintiff as a party to the alleged contract and therefore Roth's title as office manager may be disregarded as immaterial and without significance.

In so far as the record discloses Roth was the only salesman plaintiff had in Chicago and, regardless of his title as sales manager, defendant knew him as a salesman and dealt with him as such. Kendrick, one of defendant's representatives in the transaction with Roth, referred to him in his (Kendrick's) testimony as plaintiff's salesman. There is no evidence in the record which shows that at the time of the transaction in question defendant placed any reliance on Roth's title as sales manager as giving him the appearance of authority to sell plaintiff's merchandise at a discount larger than that ordinarily allowed. Whenever the name or title given an agent is a material circumstance to be considered in determining

the appearance of authority bestowed on him, it is material because it tends to show "what powers are his," considering the nature, objects and purposes of the business in which he and his principal are engaged. Here the circumstance that Roth was designated by plaintiff as sales manager of its Chicago office, in and of itself, did not tend to show what his powers were. It is difficult to perceive how under the facts of this case Roth's title as sales manager can be considered as having any more significance than if his title was merely that of salesman.

We are impelled to hold that the circumstance that Roth had the title of sales manager of plaintiff's Chicago office, standing alone, was insufficient to prove that plaintiff clothed him with apparent authority to bind it as a party to the alleged contract.

Other points have been urged and considered but in the view we take of this case we deem it unnecessary to discuss them.

For the reasons stated herein the judgment of the Municipal court of Chicago is affirmed.

JUDGMENT AFFIRMED.

Friend and Scanlan, JJ., concur.

43014

VICTOR ROEDELSHEIM and
BELLE ISAACS,

Appellants,

v.

12TH STREET STORE CORPORATION,
a corporation, HARRY OKIN,
ISADORE SHALOWITZ, PORTER FOX,
I. B. LIPSON and I. D. PRICKETT,
Defendants.

12TH STREET STORE CORPORATION,
a corporation, HARRY OKIN and
ISADORE SHALOWITZ,

Appellees.

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APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

In the complaint filed herein, which is separated into two counts wholly independent of each other, Victor Roedelsheim, as holder of preferred stock of the 12th Street Store, Inc., an Illinois corporation, sought to enjoin the 12th Street Store Corp., a Delaware corporation, from voting the common stock of the Illinois corporation; and Belle Isaacs, as holder and owner of common stock of the Delaware corporation, sought a decree requiring the Delaware corporation to transfer to her common stock of the Illinois corporation upon surrender by her of common stock in the Delaware corporation. The chancellor allowed defendants' motion to strike the complaint because he was of the opinion that it failed to state a cause of action as to either of the plaintiffs, and dismissed the complaint for want of equity.

The first count of the complaint alleges that Roedelsheim owns 200 shares of the preferred stock of the 12th Street Store, Inc. (an Illinois corporation), whose authorized capital stock consists of 40,000 shares of preferred stock, of which 36,675 are outstanding, and 50,000 shares of common stock which were acquired and are owned by the 12th Street Store

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Corporation (a Delaware corporation), organized in 1928, when the Illinois corporation issued its preferred stock, and at which time all the owners and holders of its common stock transferred and assigned their respective shares to the Delaware corporation and received in exchange therefor the common stock of the Delaware corporation; that the Delaware corporation was organized for the sole and only purpose of acquiring, owning and holding all the common stock of the Illinois corporation, and the only business transacted by it has been and is the voting of the common stock of the Illinois corporation; that the Delaware corporation transacts no business in the State of Delaware or in the State of Illinois or elsewhere, other than the business of voting the common stock of the Illinois corporation and maintaining its corporate life in the State of Delaware, and is known as a "holding company," whose only assets consist of the common stock of the Illinois corporation; that the sole and only purpose for the organization of the Delaware corporation was to create a voting trust, contrary to the public policy of the State of Illinois, and to control the corporate affairs of the Illinois corporation for an indefinite period of time, without any fixed or lawful purpose, to the disadvantage of the holders of its preferred stock; that as a result of the ownership by the Delaware corporation of all the authorized and outstanding common stock of the Illinois corporation, Roedelsheim and all other owners of shares of preferred stock of the Illinois corporation are deprived of the opportunity, at meetings of the shareholders of the Illinois corporation, of conferring with true owners of the common stock of the Illinois corporation, to wit, those owners of common stock of the Illinois corporation who have

exchanged their shares for shares of stock of the Delaware corporation; and that as a result of these circumstances, Roedelsheim has been "greatly and irreparably" damaged and therefore seeks an adjudication that the Delaware corporation has no legal right to vote the shares of common stock of the Illinois corporation and asks for appropriate injunctive relief.

The second count, in which Belle Isaacs sets forth her complaint, alleges the existence and corporate structure of the two companies, the organization of the Delaware corporation in 1928, at which time the owners of shares of the Illinois corporation exchanged their stock for shares of the Delaware corporation; that her deceased husband, Henry Isaacs, was one of the stockholders who participated in the exchange and thereby acquired 10,000 shares of the Delaware corporation, to the ownership of which she succeeded upon his death; that the Delaware corporation was organized solely for the purpose of acquiring, holding and voting all of the common stock of the Illinois corporation and in lieu of the creation of a voting trust which would not have been permitted under the laws of Illinois; that the Delaware corporation has transacted no business other than the voting of the common stock of the Illinois corporation, has no assets other than the common stock and has maintained its corporate life solely for the purpose of controlling the business and operation of the Illinois corporation; that she is deprived of any voice in the management of the Illinois corporation and "irreparably damaged" by reason thereof; and therefore she seeks a decree, upon surrender by her for cancellation of the certificate evidencing the 10,000 shares of the Delaware corporation, requiring defendants to transfer to her a proportionate number of shares of the Illinois corporation.

1. *Journal of the American Medical Association*, 1997; 277: 1033-1037.

1. *Chlorophyll a* (Chl *a*)

1. *Chlorophyll a* and *Chlorophyll b* were determined by the method of Lichtenthaler (1987).

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THE UNIVERSITY OF CHICAGO

1. *Chlorophyll a* (Chl *a*)

The right to the relief sought by both plaintiffs is predicated on the theory that the public policy of Illinois does not permit a corporation to be formed or organized for the sole purpose of holding and voting the capital stock of another corporation, and that the creation of the Delaware corporation for the purpose of retaining the voting control of the Illinois corporation was therefore illegal. Cases cited in support of this argument antedate the recodification of the law pertaining to corporations in 1919, and since public policy is never static (50 C. J. 858) and may be changed or affected by legislative enactment, it becomes pertinent to compare the earlier statutes with those passed in 1919 and subsequent thereto. It is apparently conceded that prior to 1919 the Corporation Act of Illinois (ch. 32, Hurd's Ill. Rev. Stat. 1917) did not, in express terms, confer upon a corporation the power to purchase and hold shares of stock of another corporation. It merely permitted corporations to be formed for any lawful purpose and to own so much personal property as might be necessary to carry out the purpose or purposes for which it was organized. The earlier decisions interpreted the public policy of the state as prohibiting, except for a very limited purpose, the holding of stock by one corporation in another (Central Life Securities Co. v. Smith, 236 Fed. 170, Converse v. Emerson & Co., 242 Ill. 619, 90 N. E. 269, Converse v. Gardner Governor Co., 174 Fed. 30), and the control of one corporation by another (United Vacuum Sweeper Co. v. Groth, 210 Ill. App. 358).

Section 6 of the General Corporations Act of 1919 (ch. 32, Ill. Rev. Stat. 1919) conferred upon corporations the right, power and privilege "to own, purchase or otherwise acquire, whether in exchange for the issuance of its own stock, bonds, or other obligations or otherwise, and to hold, vote, pledge,

or dispose of the stocks, bonds, and other evidences of indebtedness of any corporation, domestic or foreign."

The power so granted in 1919 was broadened in section 157.5 of the 1933 act (ch. 32, Smith-Hurd's Ill. Rev. Stat. 1935) as follows: "To purchase, take, receive, subscribe for, or otherwise acquire, own, hold, vote, use, employ, sell, mortgage, loan, pledge, or otherwise dispose of, and otherwise use and deal in and with, shares or other interests in, or obligations of, other domestic or foreign corporations, associations, partnerships, or individuals."

Neither the 1919 enactment nor the amendment of 1933 placed any limitation on the amount of stock which may be acquired. As an indication that no restriction was contemplated, section 7 of the 1919 act excepts from the rights so granted the power to acquire "the whole or any part of the stock *** of another corporation, where the effect of such acquisition may be substantially to lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition"; and the intention of the legislature to place no other limitation on the power granted in section 7 is further emphasized by the following provision contained in the last part of paragraph 2 thereof, "this section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition ***."

Section 84 of the 1919 Act provides that foreign corporations "shall enjoy the same, but no greater rights and privileges and be subject to all the liabilities, restrictions, duties and penalties now in force or hereafter imposed upon domestic corporations of like character," and section 157.156 extends the privileges and powers granted to cor-

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1. The first part of the report deals with the general situation of the country and the progress of the work during the year.

2. The second part of the report deals with the results of the work done during the year. It is divided into two sections: the first section deals with the results of the work done in the field, and the second section deals with the results of the work done in the laboratory.

3. The third part of the report deals with the conclusions drawn from the results of the work done during the year. It is divided into two sections: the first section deals with the conclusions drawn from the results of the work done in the field, and the second section deals with the conclusions drawn from the results of the work done in the laboratory.

4. The fourth part of the report deals with the recommendations made by the committee. It is divided into two sections: the first section deals with the recommendations made by the committee in regard to the work done during the year, and the second section deals with the recommendations made by the committee in regard to the work to be done in the future.

porations under the 1933 Act to corporations previously organized. In commenting upon section 84 of the 1919 Act, the Supreme court in Friend v. Goldsmith, 307 Ill. 45, said that "this section expressly confers upon foreign corporations admitted to do business the same rights and privileges enjoyed by domestic corporations. *** While the Act does not declare foreign corporations complying with its terms to be domestic corporations nor purport to adopt the foreign corporations, it does clothe foreign corporations with the same powers, rights and privileges and imposes upon them the same liabilities and duties as domestic corporations. There is essentially no difference between the foreign and domestic corporation." It would thus seem that the foregoing statutes changed the public policy of this state so that since their enactments corporations are empowered and authorized to own stock in other companies and it was expressly so held in the recent case of Lewis v. West Side Trust and Savings Bank, 376 Ill. 23, wherein the court said: "The 1919 Act under discussion changed the public policy of this State and permitted corporations to hold stock of other companies for the first time. It was included in the general powers granted all corporations, and they would have the power to hold stock in the absence of a restriction in their charters. Defendants insist it is against the public policy of this State to permit a corporation to hold stock of a banking corporation, but what we have said shows this point is groundless. The Legislature, which is the judge of what is politic for this State, changed its policy by the 1919 Corporation Act, and stockholding by corporations was thereby authorized."

Although plaintiffs apparently concede that corporate ownership of stock in another company is not forbidden under the present statutes, they argue that such ownership does

not go to the extent of obtaining control. No cases decided subsequent to the statutory enactments of 1919 and 1933 are cited in support of the contention and neither of those statutes justify the suggested limitation upon stock ownership. It is true that in some states, notably New York and Massachusetts, corporate holdings of stock of other corporations are restricted to specified percentages but our legislature in revising the Corporate Acts in 1919 and again in 1933 evidently intended to permit corporations the same freedom to own and acquire stock of other companies as that possessed by individuals; and the legislature having concluded not to place any restriction upon corporate holdings courts will not trespass on legislative prerogatives.

Lastly it is urged that corporations may hold and own the stock of another company only in connection with the carrying out of lawful corporate purposes, that is to say, some other lawful corporate purpose than the owning of stock; and it is argued that when the only purpose of stock ownership is to obtain corporate control and no other lawful purpose exists the incidental power to own stock is illegal. The same argument was evidently made before the chancellor who heard this proceeding and was rejected by him with the comment that "this would be the extreme of judicial legislation. There is nothing in the decisions of our courts nor in the equities presented by the complaint which would warrant such drastic revision of the legislative intent as expressed in the language of the act." Plaintiffs' counsel concede that they have been unable to find any cases in this state where the precise question has arisen and we know of none that would justify support of the contention made. Since corporations may now be organized for any "lawful purpose" and the ownership of stock whether by an individual or corporation is lawful, it would seem to be

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permissible to incorporate for the sole purpose of buying stock of one or more companies. Moreover, although the complaint alleged that the Delaware corporation was organized for the "sole and only purpose of acquiring and holding stock of the Illinois corporation," the charter powers of the Delaware corporation are nowhere set forth in the complaint and we have before us only the general conclusion of the pleader. In Evanston Electric Illuminating Company v. Kochersperger, 175 Ill. 26, plaintiff sought to resist the collection of a tax extended upon a valuation of its capital stock and franchise by the State Board of Equalization on the ground that it was organized purely for the purpose of manufacturing electricity and was therefore exempted from assessment, under section 3, chapter 120 of the Illinois Revised Statutes. In discussing the contention made the court said that in order to settle that question resort "must be had to its charter" and quoted from a statement in Distilling Co. v. People, 161 Ill. 101, as follows: "It goes without saying, that the purpose for which a corporation is organized must be ascertained by reference to the terms of its charter."

In addition to the foregoing considerations presented plaintiffs argue that "the organization of the Delaware corporation was, in fact, the creation of an invalid voting trust under the laws of the State of Illinois" and upon the authority of Luthy v. Ream, 270 Ill. 170, they say that in the instant case the directors of the Delaware corporation elected by the stockholders are in fact voting trustees of all of the common stock of the Illinois corporation; and because the only activity carried on by the directors of the Delaware corporation is the domination of the Illinois corporation through the voting of its common stock, it is clear that there is no difference between the corporate device and

The first thing I noticed when I stepped out of the car was the cold. It was a sharp contrast to the warm blanket I had been sitting under. I looked up at the sky, which was a pale, hazy blue. The air was crisp and clean, a welcome change from the stuffy atmosphere of the car. I took a deep breath, feeling the cool air fill my lungs. The sun was just beginning to rise, casting a soft, golden glow over the landscape. The trees were still, their branches bare and reaching out towards the sky. The ground was covered in a thin layer of snow, which glistened in the morning light. I walked slowly, my boots crunching against the snow. The silence was peaceful, a rare moment of quiet in a busy world. I felt a sense of freedom, of being able to breathe and see without any constraints. The world was mine for the moment, and I was going to make the most of it. I walked until I was out of breath, my heart pounding with excitement. I turned back, looking at the path I had just traveled. It was a simple path, but it felt like it led to something great. I smiled, knowing that I had found what I was looking for. The journey was over, but the memories would last forever.

a voting trust and that the adoption of the corporate device was a mere subterfuge to avoid the illegality of a voting trust. It appears, however, that no facts are alleged showing the existence of a voting trust; that in fact and indeed the complaint shows that no voting trust existed or was contemplated because there was no separation of voting power and ownership. The Delaware corporation being the sole owner of the stock, had no occasion to enter into a voting trust agreement with itself. This question is fully discussed in Babcock v. Chicago Railways Co., 325 Ill. 16, and, in the recent case of Rittenberg v. Murnighan, 331 Ill. 267, the Supreme court reiterating its approval of the doctrine announced in the Babcock case distinguished the doctrine enunciated in that decision from Luthy v. Ream.

For the reasons indicated we think the chancellor properly held that the complaint in neither of its counts states a cause of action and the judgment of the Superior court of Cook county dismissing the complaint is affirmed.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

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ST. PAUL-MERCURY INDEMNITY
COMPANY OF SAINT PAUL, a
corporation,

Appellee,

v.

JAMES F. HOEY, Defendant below.

C. J. HOFFMAN, doing business
as CHICAGO-KANSAS CITY FREIGHT
LINES, Garnishee-Defendant below,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

C. J. Hoffman, doing business as Chicago-Kansas City Freight Lines, appeals from a judgment entered against him as garnishee in favor of the plaintiff, St. Paul-Mercury Indemnity Company of St. Paul, in the sum of \$963.93.

It appears that James F. Hoey, the judgment debtor, doing business as Midland Service Company, had conducted a freight or trucking service from Chicago to Kansas City, Missouri, through the State of Iowa. On May 26, 1937 plaintiff executed its indemnity bond or policy for the fulfillment of Hoey's tax obligations to the State of Iowa, whereby it agreed to indemnify the state for ton-mile taxes due it, in the event that such taxes were not paid by Hoey. Subsequently Hoey became delinquent in the payment of taxes from June 7, 1939 to September 20, 1939, inclusive, and failed to pay the State of Iowa the sum of \$951.23 which had become due. As the result of Hoey's default and by virtue of the terms and conditions of the indemnity agreement, plaintiff paid the State of Iowa the sum of \$951.23, and claiming to have become subrogated to all the rights of the state, it brought suit against Hoey in the Municipal court on June 29, 1942 for the sum which it was obliged to pay. Hoey defaulted, and judgment was entered against him

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on plaintiff's statement of claim. Thereafter plaintiff instituted garnishment proceedings in the Municipal court, naming C. J. Hoffman, doing business as Chicago-Kansas City Freight Lines, as defendant garnishee, and in that proceeding it filed written interrogatories directed particularly to the details of a transaction had between Hoey and Hoffman January 2, 1940. From Hoffman's answers to these interrogatories, it appears that he purchased from Hoey for the sum of \$6,500 substantially all the equipment then owned by him and used in his business which was carried on as Midland Service Company, with the exception of some office furniture valued at \$500, and including a certificate of authority to operate as a motor carrier between Chicago, Illinois and Kansas City, Missouri, issued by the Interstate Commerce Commission in the year 1935. In the trial of the garnishment proceeding, the parties stipulated in open court that no written notice was ever given by Hoey to Hoffman as to his creditors, and that no written notice of the transfer by Hoey to Hoffman was ever sent to the State of Iowa or to plaintiff. Plaintiff's garnishment was instituted on the theory that the sale of Hoey's trucking business was in violation of the Bulk Sales Act (Ill. Rev. Stat. 1943, ch. 121-1/2, sec. 78 et seq.), that Hoffman's purchase was therefore fraudulent, and that the chattels thus fraudulently acquired by Hoffman from Hoey were subject to garnishment.

The garnishee's principal contention is that the acquisition of Hoey's freight line was not within the purview of the Bulk Sales Act, and therefore the requirements thereof did not have to be complied with. From the evidence adduced upon the hearing it appears that the tractor and trailers sold by Hoey to Hoffman were worth approximately \$1,200 and constituted a major portion of the goods and chattels of Hoey's busi-

ness, except for the office furniture which was sold to others. Hoffman argues that since the greater part of the purchase price must have been paid for the certificate of authority issued by the Interstate Commerce Commission, which was intangible property, the transaction was not a sale in bulk, because intangibles cannot be the subject of such a sale. It is clear, however, that the sale of the tractor and trailers was not in the regular course of Hoey's business. He sold substantially everything used in his freight business, to Hoffman, in bulk. He was operating a transfer company and used the three units of motor equipment for that purpose. Those chattels constituted his stock in trade, and when he sold them, nothing was left, except office furniture, and although the certificate of authority to operate was included in the sale, we think the value thereof must be disregarded in determining whether the transaction falls within the provisions of the act. In Page v. Wright, 194 Ill. App. 149, it was held that the sale of livery stock, including an automobile, a gasoline engine and lighting outfit, together with other articles, came within the provisions of the act. Again, in Athon v. McAllister, 205 Ill. App. 41, the court held that the sale of certain office furniture, horses, colts, wagons, trucks, drays, harness, farm machinery, hogs, pigs, growing corn, and the like, used or produced either in the dray and transfer business, or in the business of farming, came within the purview of the act.

It is next urged that the State of Iowa was not one of Hoey's creditors on January 2, 1940 within the meaning and purview of the Bulk Sales law. Reverting to the statement of claim upon which the original judgment was entered against Hoey, we find that it was there alleged that plaintiff obligated itself as surety on Hoey's bond in favor of the State of Iowa,

that the bond was given to guarantee to the state the payment of the ton-mile taxes due from Hoey, and that taxes in the sum of \$951.23 became due and delinquent between June 7, 1939 and September 20, 1939. Judgment having been rendered in favor of plaintiff against Hoey on that statement of claim, the facts alleged constituted an adjudication between the parties to that suit. Bauer v. Benton State Bank, 258 Ill. App. 332; Buerger v. Buerger, 317 Ill. 401; Rubin v. Kohn, 344 Ill. 166; Boddiker v. McPartlin, 379 Ill. 567. The entry of the judgment adjudicated the facts alleged in the statement of claim, namely, that at the time of the sale Hoey owed the State of Iowa \$951.23, and when the judgment was entered the claim was reduced to a liquidated sum within the purview of the act. It is urged that there is no proof so far as the garnishee is concerned, that the State of Iowa was Hoey's creditor at the time of the sale, and that plaintiff became subrogated to the right of the state. This contention is untenable inasmuch as the court takes judicial notice of the facts established by the record of the case in which the original proceedings are instituted (Dandridge for use of Appell v. Northern Trust Co., 218 Ill. App. 138), and it is not necessary for plaintiff in the garnishment proceedings to prove facts in the record which clearly disclose that plaintiff became Hoey's creditor by subrogation; and when plaintiff obtained its judgment against Hoey, the court adjudicated the fact that the State of Iowa was Hoey's creditor, ~~and the time of~~ ~~and~~ that its claim was then liquidated and past due, and that plaintiff was subrogated to the rights of the state with respect to that claim. The garnishee cannot now collaterally attack the judgment by attempting to inject facts contrary to those adjudicated by the court.

It is also urged by the garnishee that plaintiff was

not Hoey's creditor in any sense at the time of the transfer. That question was likewise adjudicated in the original judgment under facts alleged in the statement of claim, the court having determined that the State of Iowa was Hoey's creditor on January 2, 1940, and that plaintiff was subrogated to the state's claim by reason of its indemnity agreement and could assert against Hoey the right of the state as a creditor at the time of the sale and attack the sale as fraudulent under the Bulk Sales law. Babcock v. Blanchard et al., 86 Ill. 165.

Plaintiff argues with considerable force that aside from the foregoing considerations, plaintiff was a creditor of Hoey at the time of the sale because when it became bound to the State of Iowa on Hoey's bond, the law immediately raised a promise on the part of Hoey to reimburse plaintiff for any amount that plaintiff became obligated to pay; and since at the time of the sale there was a definite obligation on Hoey's part to pay the State of Iowa \$951.23 then due and payable, Hoey was therefore bound to reimburse plaintiff to satisfy that liability, and plaintiff thereby became Hoey's creditor for the liquidated amount of \$951.23 within the purview of the Bulk Sales Act, with the right to attack the sale as having been fraudulently made. O'Connell v. Nelson, 281 Ill. App. 327, Estate of Ramsay v. Whitbeck, 183 Ill. 550, and Evans v. Illinois Surety Co., 298 Ill. 101, support plaintiff's contention.

We are of opinion that the judgment of the Municipal court was properly entered, and it is affirmed.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

43061

LEONIDAS C. KYLAVOS,
Appellant,

v.

TOM POLICHRONES, etc.,
et al.,

Appellees.

APPEAL FROM SUPERIOR COURT,

COOK COUNTY.

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

December 27, 1937 plaintiff was injured as the result of being struck by broken glass from a swinging door leading into the restaurant owned and operated by defendants at 54 East Monroe street, Chicago. His suit for damages in the Superior court resulted in judgment entered on a directed verdict in favor of defendants. We reversed the judgment order on appeal (case No. 42122, 316 Ill. App. 444, Abst.) and remanded the cause for retrial, holding that it was a question for the jury to determine whether defendants were liable. Aside from the principal question involved in that appeal, it was also urged by plaintiff that the court erred in denying his motion for change of venue. We held that since the motion was presented after the cause was called for trial and after numerous continuances had been granted, it was not made in apt time, and therefore the trial judge was within his rights in denying it. The cause was subsequently redocketed in the Superior court and assigned to Judge Charles A. Williams. Plaintiff again filed a petition for change of venue, which was denied, and the cause was submitted to a jury, resulting in a verdict of not guilty in favor of the defendants. Although plaintiff appeals from the judgment entered against him, and also from the court's adverse ruling as to his petition for a change of venue, he has not brought up a report of the proceedings, and it

must therefore be assumed that the second trial was fairly and impartially conducted. Thus the only question presented is whether the court properly denied his petition for the change of venue.

After the cause had been redocketed in the Superior court it was assigned to the trial calendar of Judge Charles A. Williams. This assignment was made almost two months before plaintiff filed the petition for change of venue with which we are now concerned. The cause actually appeared on the daily trial call before Judge Williams on September 28, 1943. Defendants say that it was continued by agreement of counsel to October 19, 1943, but plaintiff denies that any such agreement was made, and the record is silent on the subject except for the recital in an order entered by Judge Williams on December 23, 1943, wherein the court expressly found "under point 10 of plaintiff's motion for a new trial and for judgment notwithstanding the verdict that the said cause of action first appeared upon the printed trial calendar of Judge Charles A. Williams at the opening of court in September, 1943, and that the said cause of action appeared upon the daily trial call before this court on September 28, 1943, and on said date by agreement between counsel for plaintiff and defendants, said suit was continued by the court to October 19, 1943; that on October 19, 1943, plaintiff's petition for a change of venue was presented and denied; that said cause remained on the daily trial call until October 25, when trial was commenced."

Prior to the first trial plaintiff had petitioned for a change of venue from ten judges sitting in the Superior court, including Judges Michael L. McKinley, who presided at the first trial, and Charles A. Williams, who presided at the second trial. Subsequent to reinstatement of the cause in

the Superior court following our reversal on the first appeal and after it had appeared on the daily trial call before Judge Williams on September 23, 1943, plaintiff presented a petition for a change of venue on October 19, 1943. In order to overcome the requirements of section 6 of the Venue Statute (Ill. Rev. Stat. 1943, ch. 146) plaintiff, after naming the several judges who were prejudiced against him, including Judge Williams, alleged "that a knowledge of such prejudice of Judges Charles A. Williams [and the other judges named] did not come to the petitioner, until the 11th day of May, A. D. 1941 * * *, and that your petitioner had no knowledge that this cause was pending before the said Judge Charles A. Williams until the 18th day of October, A. D. 1943, when he immediately executed the herein Petition for Change of Venue, upon his return from Canada"; and it is urged that when the petition was denied on October 19, 1943, the cause had not yet been reached for trial and was not in fact tried until October 25th, and therefore the court should have allowed the petition as having been made in apt time.

Aside from the question whether the ten-day notice requirement of section 6 is mandatory, or whether plaintiff sufficiently complied with the statute by alleging that he did not know the matter had been assigned to Judge Williams until the day before his application was made, it is clear that plaintiff's application was not made in apt time. By his own affidavit he admits knowledge of the alleged prejudice of Judge Williams in May 1941, and the records of this court on the prior appeal disclose that plaintiff had included Judge Williams, with other judges of the Superior court, in his petition for change of venue filed before Judge McKinley prior to the first trial. Since he had had that knowledge for some 28 months before the case was assigned to Judge Williams, and the cause

appeared on the latter's trial call September 28, 1943, it was incumbent upon plaintiff to make his application at the earliest possible moment. However, he waited almost a month after the appearance of the cause on Judge Williams' trial call and then sought to excuse himself by alleging that he did not know until October 15th, when he returned from Canada, that the cause was pending before Judge Williams. Plaintiff's affidavit does not state when he went to Canada or how long he remained there. For all that appears in the petition he may not have gone to Canada until long after the cause appeared upon Judge Williams' call in September. Moreover, his counsel, who also represented him in the first trial and all through this proceeding, were undoubtedly aware of the fact that the cause had been assigned to Judge Williams and that it had appeared on Judge Williams' call in September, and his counsel's knowledge of that fact is chargeable to the client.

Accordingly we are of opinion that Judge Williams was within his rights in denying the motion, and the judgment of the Superior court is therefore affirmed.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

1. The first part of the book is devoted to a general

introduction to the subject of the book.

2. The second part of the book is devoted to a

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43105

ELINOR AVRAMS and WARD PATTON,
Appellants,

v.

WILLIAM H. FULLER,

Appellee.

APPEAL FROM CIRCUIT

COURT, COOK COUNTY.

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiffs sued in tort to recover damages from defendant for personal injuries sustained by them June 18, 1942. Trial by jury resulted in verdicts for Elinor Avrams, one of the plaintiffs, in the sum of \$1,500, and for Ward Patton in the sum of \$100. Plaintiffs then filed a joint motion for a new trial, which was denied, and judgments were entered on the verdicts of the jury. Plaintiffs appeal from the refusal of the trial court to grant them a new trial and also from the judgments in their favor on the sole ground that the jury's awards were grossly inadequate and against the manifest weight of the evidence.

The accident was a most unusual one. It occurred about 9:30 in the evening of June 18, 1942. Mrs. Avrams lived on the north side of Thorndale avenue, about a block west of Sheridan road. She and Patton had been on the beach at the lake, and as they were returning to her home they stopped at the east curb of Sheridan road at the north crosswalk of Thorndale avenue before crossing the street and waited for northbound traffic to clear. When it had cleared they proceeded to cross the drive, and when they got out to the center line they stopped while a southbound car passed. Two young men, unknown to plaintiffs, were crossing Sheridan road from the south walk of Thorndale avenue in about the same manner as plaintiffs and at the same time. They also walked out into

10524

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

Figure 1. The effect of the concentration of the *Agrobacterium* suspension on the transformation efficiency of *Agrobacterium* strains. The concentration of the *Agrobacterium* suspension was 10⁶ cells/ml (A), 10⁷ cells/ml (B), and 10⁸ cells/ml (C). The concentration of the *Agrobacterium* suspension was 10⁶ cells/ml (A), 10⁷ cells/ml (B), and 10⁸ cells/ml (C). The concentration of the *Agrobacterium* suspension was 10⁶ cells/ml (A), 10⁷ cells/ml (B), and 10⁸ cells/ml (C).

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Reference is made to the above mentioned letter, which is attached hereto as follows:

1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 26

NOTE: The following information is for informational purposes only.

Содержание: 1. Общие сведения о предприятии. 2. Описание продукции. 3. Анализ рынка. 4. Финансовый анализ. 5. Заключение.

the plaintiffs and at the same time, they were forced into

the street and had just passed the center line of Sheridan road when defendant's northbound automobile, proceeding at a rather high rate of speed, struck the two young men, threw them into the air and killed both of them. One of the bodies was hurled across Thorndale avenue and struck Mrs. Avrams in the abdomen and knocked her down. Patton was also struck and thrown a distance of about eight feet to the north. Both of the plaintiffs were injured.

Defendant argues that some consideration should be given to the question of negligence where the verdicts are complained of as being too small. We had occasion to pass on this question under similar circumstances in Borkstrom v. South Shore Garages, Inc., 323 Ill. App. 285, Gen. No. 42670 (not published in full). In that case, as here, defendant filed no cross-appeal, and like the defendant in this proceeding, asked that the judgment be affirmed. We held that upon the record presented "we must assume that the finding of the jury is proper as to defendant's guilt, since *** it filed no cross-appeal, and asks that the judgment be affirmed." We think that case is precisely applicable to this appeal, and therefore the only question to be considered is whether the verdicts were so grossly inadequate that the court should have allowed plaintiffs' motion for a new trial.

There is ample precedent for the allowance of a motion for a new trial where the damages allowed by the jury are insufficient. Montgomery v. Simon, 309 Ill. App. 516. It was there pointed out that at common law new trials were not allowed upon the ground that the damages awarded by the jury were insufficient, but "the modern rule is that a new trial may be granted where the verdict is grossly inadequate, for

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the same reasons as those governing where the verdict is excessive," quoting from Kilmer v. Parrish, 144 Ill. App. 270, and citing other cases.

Reverting then to the injuries sustained by plaintiffs, we find considerable evidence adduced upon the trial. Mrs. Avrams testified that she was rendered unconscious by the impact of the body of one of the young men, then regained consciousness while she was still at the scene of the accident, later fainted and did not awaken until she found herself in the Edgewater Hospital. She was treated by Dr. Reuben Mark, whom she did not know before, and was kept under sedatives for some time. She had pains in the abdomen and in her back from her shoulder blade to her hip, but mainly in the small or center of the back, and was kept in the hospital two months lacking four days. After X-rays were taken, a plaster cast was applied extending from the bust to the hips, was kept on all the time she remained at the hospital and was still on when she was discharged. She described the pain in her abdomen as very severe, and Dr. Schlepak treated her for that condition. After she left the hospital she was able to walk but had to remain in bed part of the time at home even after the cast was removed at the end of approximately two months. Dr. Mark continued to attend her at home until February 9, 1943, a period of almost eight months. At the time of the trial she still complained of pains in the abdomen and the small of the back. She was 40 years of age at the time of the accident and was employed as a switchboard operator at the Buena Park Hotel earning \$70 a month, having worked there for almost two years. Before that she had worked as a switchboard operator for many years in other places. Following the

accident she was unable to work until February 1943, when she returned to the Buena Park Hotel, continued less than a month, and was then compelled to leave because she could not do the work. The last of April 1943 she obtained employment with the Duplex Table Pad Company rendering a different kind of service, and was working there at the time of the trial. Some five or six years before the accident she learned that she was afflicted with syphilis, a condition which was evidently of long standing, and was treated for that ailment which had affected her right leg between the hip and knee, but the condition was cleared up so that she had been working for about two years before the accident six days a week. Her hospital bill amounted to \$397.25, all of which was paid. Her loss of time, from June 18, 1942 to February 1, 1943 at the rate of \$70 a month, amounted to more than \$500, and Dr. Mark's bill for professional services was \$650, or an aggregate expense of more than the \$1,500 awarded her by the jury.

Dr. Mark, who was on the staff of the Edgewater Hospital, testified that he first saw Mrs. Avrams in the emergency room. She was in shock, had a cold clammy sweat, with rapid pulse and low blood pressure, and was complaining of pain. Preliminary treatment was directed principally toward combating shock. When the effect of the injury localized about 36 hours later, she complained of marked pain in her left chest, front and back, and difficulty in breathing. She also had a pain over the upper left quadrant of the abdomen, which was swollen in that region about one and one-half times normal size and which later became discolored and extremely tender. She also had marked pain in her right foot and ankle which were swollen and attended with a limitation of motion in the joint. The ankle was immobilized and elevated. About

the third day she complained, in addition to the abdominal distress, of pain over the bladder region. Urinalysis showed blood in the urine. She also complained of pain in the lower lumbar region of the back and required sedatives for a considerable period to induce sleep. After the body cast was put on to immobilize the back, Dr. Mark saw her twice daily during the early part of her stay and thereafter once each day. She was given short wave diathermy treatments to the back and ankle and attended by Dr. Mark until February. He stated that the ankle progressed satisfactorily under heat and massage treatment; that her chest was strapped with adhesive, and although there were no rib fractures, she had sustained a muscle and deep tissue injury to the pectoral wall. Chest strappings were kept on from 12 to 14 days before the body cast was applied. Dr. Schlepak, a specialist, was called in consultation for the kidney and bladder difficulty, and he treated distention of the abdomen and blood in the urine by medication. X-ray findings were negative, and the condition cleared up satisfactorily.

Dr. Nathan S. Zeitlin testified as an X-ray specialist of long experience and in charge of that department at the Edgewater Hospital. He identified certain films taken by him while Mrs. Avrams was there and stated that one of them showed a fracture of the left transverse process of the third lumbar vertebra; that there were some arthritic changes in the lumbar spine, but nothing unusual for a woman of her age.

The only witness produced by defendant on the medical side of the case was Dr. Hollis E. Potter, who read the X-rays that had been received in evidence. He gave it as his opinion that no one of the films showed any fracture, as testified to by Dr. Zeitlin, and that there was no evidence of callus which

would indicate a former fracture. Defendant adduced no evidence bearing on the reasonableness or unreasonableness of the expenses sustained by plaintiffs or on any other special damages proved.

The other plaintiff, Patton, went to the hospital with Mrs. Abrams and was taken home about 1:30 in the morning. The following day he had pains in his head and chest and found it difficult to breathe. His leg was sore so that he could scarcely walk. He consulted a physician, who dressed his wrist and elbow, put a bandage on his chest and gave him medication. Patton testified that he was a painter by trade, earning \$1.725 an hour, eight hours a day, five days a week, aggregating \$69 a week; that he was unable to work for 30 days, at a loss of approximately \$300. When he returned to work he was unable to stand on high scaffolding because it made him "sick and dizzy," and he was laid off from one job by reason thereof. Dr. B. J. Mix testified that he first attended Patton in his office the morning following the accident. He found contusions on both sides of his chest, abrasions of the left elbow, forearm and wrist, and skin denudations of his left hip, a swollen ankle and wrist. The left wrist and ankle were placed in an adhesive cast. Plaintiff's chief complaint was of pain in the chest on breathing, dizziness and severe headaches. X-rays taken showed no fractures. The charge for Dr. Mix's services was \$60.

It may be conceded that the amount of damages to be allowed is peculiarly a question for the jury, but when the verdict is either excessive or grossly inadequate, indicating passion or compromise, a new trial should be granted. Luner v. Gelles, 314 Ill. App. 659; Montgomery v. Simon, 309 Ill.

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App. 516; Kilmer v. Parrish, 144 Ill. App. 270. With respect to the item of \$525 representing the loss of time for Mrs. Avrams and Dr. Mark's bill of \$650, defendant argues that "the jury clearly were free to consider the testimony and use their own best judgment, both as to the amount of loss of time as due to plaintiff's injuries from the accident solely and as to how much of Dr. Mark's charge was to be allocated to the same accidental injuries solely." The implication is that because of Mrs. Avram's syphilitic condition six years prior to the accident, some of the time lost from work and part of Dr. Mark's treatment could be attributed to that illness. However, there is no evidence to sustain any such argument. She worked steadily for two years before the accident and testified that the condition was cleared up before 1942; and there is nothing in Dr. Mark's testimony to indicate that the injuries for which he treated Mrs. Avrams had anything to do with her former condition, but that they were solely due to the accident in question.

The fact that she was out of pocket \$1,572.25 and was awarded damages of only \$1,500 by the jury, with no allowance for the pain and suffering that she must have endured during her treatment in the hospital and while she was encased in a plaster cast for seven weeks, would indicate without further argument that the verdict was grossly inadequate. The same may be said with respect to Patton, who had a doctor bill of \$60, lost \$300 by reason of absence from work, and sustained injuries which impaired his efficiency as a painter.

We therefore hold that the verdicts were so grossly inadequate as to be against the manifest weight of the evidence, and that the court erred in denying plaintiffs'

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motion for a new trial. Accordingly the judgments are reversed and the cause is remanded for retrial.

JUDGMENTS REVERSED AND CAUSE
REMANDED FOR RETRIAL.

Sullivan, P. J., and Scanlan, J., concur.

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43139

JOHN G. EENIGENBURG,
Appellee,

v.

LINCOLN-LANSING DRAINAGE
DISTRICT, a body politic
and corporate, and PETER
BULTEMA, GEORGE B. ZANDSTRA
and OTTO F. KALVELAGE,
Commissioners of said Drainage
District,

Appellants.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Relator brought mandamus proceedings against Lincoln-Lansing Drainage District and its three commissioners, Peter Bultema, George B. Zandstra and Otto F. Kalvelage, to compel payment of a \$3,500 judgment for damages sustained to relator's crops when his land was overflowed as a result of defective drainage and the destruction of a dam by the commissioners. On appeal we affirmed that judgment in case No. 41499 (310 Ill. App. 179), and subsequently leave to appeal was denied by the Supreme court. Respondents moved to strike the petition for mandamus on the ground that the statute (Drainage Act, Ill. Rev. Stat. 1943, ch. 42) does not permit payment of tort judgments. The court having denied the motion, respondents thereupon filed their answer, again averring by way of defense the precise ground upon which their motion to strike the petition was predicated. Relator then filed a motion to strike the answer, which was allowed, and an order was entered for a peremptory writ of mandamus. Respondents appeal from the order striking their answer and from the order granting the writ. Relator alleges that he is the owner

of the judgment and that there now remains due and unpaid thereon the sum of \$3,500, with costs of his suit amounting to \$41.60, costs in the Appellate court of \$10, and \$10 awarded him by the Supreme court, together with interest upon the judgment at 5 per cent per annum from June 7, 1940, the date on which it was entered, until satisfied, or an aggregate sum of \$4,130.35.

The twofold ground urged for reversal is (1) that the district cannot legally levy an assessment to provide for the payment of a judgment based upon tort liability; and (2) that there is no statutory authority which would permit the district to levy an assessment to pay the judgment where it otherwise lacks funds to do so.

The first of these contentions was disposed of on former appeal. It was there contended, as here, that the court erred in awarding the writ of mandamus because the petition failed to show a clear legal duty on the part of the commissioners to perform the acts sought to be coerced; that they had no power or authority under the statute to levy or collect a special assessment on the lands in the district; and that nothing in the statute authorized them to cause an assessment to be made. Upon the authority of Bradbury v. Vandalia Drainage District, 236 Ill. 36, Lindstrom v. City of Chicago, 331 Ill. 144, and other decisions cited in the opinion, the court held adversely to the district and commissioners, and we think that decision is decisive of the point.

The other ground urged for reversal is that the district has no available funds with which to pay the judgment, and although relator has a valid judgment for his crop damage, the law provides no way to enforce a

The first part of the paper discusses the importance of the study of the history of the United States. It is pointed out that the study of history is not only a means of understanding the past, but also a means of understanding the present and the future. The author argues that the study of history is essential for the development of a nation and for the well-being of its people. He also discusses the role of the historian and the importance of the historical method. The second part of the paper is a detailed study of the life of George Washington. It begins with his early years and his education. It then discusses his military career and his role in the American Revolution. The author also discusses Washington's political career and his role as the first President of the United States. The third part of the paper is a study of the life of Abraham Lincoln. It begins with his early years and his education. It then discusses his legal career and his role in the American Civil War. The author also discusses Lincoln's political career and his role as the President of the United States. The fourth part of the paper is a study of the life of Franklin D. Roosevelt. It begins with his early years and his education. It then discusses his political career and his role as the President of the United States. The author also discusses Roosevelt's role in the American Civil War and his role in the American Revolution. The fifth part of the paper is a study of the life of John F. Kennedy. It begins with his early years and his education. It then discusses his political career and his role as the President of the United States. The author also discusses Kennedy's role in the American Civil War and his role in the American Revolution. The sixth part of the paper is a study of the life of Lyndon B. Johnson. It begins with his early years and his education. It then discusses his political career and his role as the President of the United States. The author also discusses Johnson's role in the American Civil War and his role in the American Revolution. The seventh part of the paper is a study of the life of Hubert H. Humphrey. It begins with his early years and his education. It then discusses his political career and his role as the Vice President of the United States. The author also discusses Humphrey's role in the American Civil War and his role in the American Revolution. The eighth part of the paper is a study of the life of Hubert H. Humphrey. It begins with his early years and his education. It then discusses his political career and his role as the Vice President of the United States. The author also discusses Humphrey's role in the American Civil War and his role in the American Revolution. The ninth part of the paper is a study of the life of Hubert H. Humphrey. It begins with his early years and his education. It then discusses his political career and his role as the Vice President of the United States. The author also discusses Humphrey's role in the American Civil War and his role in the American Revolution. The tenth part of the paper is a study of the life of Hubert H. Humphrey. It begins with his early years and his education. It then discusses his political career and his role as the Vice President of the United States. The author also discusses Humphrey's role in the American Civil War and his role in the American Revolution.

satisfaction thereof, because there is no authority in the statute to permit the district to levy an assessment to pay the judgment. That question was determined adversely to respondents' contention in the Bradbury case, where the court said that "to deny to the plaintiffs a recovery of the damages which they have suffered by the effort of the owners of lands within the district to benefit themselves would be against natural right and every sentiment of justice, and we find no sufficient reason for exempting the district from liability, whether the levee is regarded as a wrongful obstruction to the waters of the river or as a lawful one under the decree of the county court." A like conclusion was reached in Farrow v. Eldred Drainage District, 359 Ill. 348, where the question arose whether the Circuit court had erred in awarding a writ of mandamus against the district and its commissioners to levy and collect a special assessment upon the lands within the district for an amount sufficient to pay a \$3,000 judgment rendered in favor of relator, and the court there held, upon the authority of Hickey v. Spring Creek Drainage District, 356 Ill. 204, that the commissioners had ample authority to levy and collect a special assessment and were directed to do so.

There is no validity to either of the defenses interposed; in fact when the matter was argued orally, respondents conceded that the relator's cases cited in support of his right to a writ were precisely in point, and they filed no reply brief.

The judgment awarding the writ of mandamus should therefore be affirmed, and it is so ordered.
JUDGMENT AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

43177

CARMEN BABA,
Appellant,

v.

JOHN RUSSELL and
CHARLES G. IGOE,
Appellees.

APPEAL FROM MUNICIPAL COURT

OF CHICAGO.

32 I.A. 61

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

As the result of a collision between two automobiles owned and driven by Carmen Baba and John Russell, respectively, Baba's car struck and damaged the automobile of Charles G. Igoe which was parked along the curb near the site of the accident. Baba sued Russell for damages to his car and Igoe brought suit against Baba and Russell for damages to his automobile. The two suits were consolidated and tried by the court without a jury, resulting in a finding and judgment for Igoe of \$280.85 against Baba and Russell and a finding and judgment of not guilty in Baba's suit against Russell. Baba appeals from both judgments on the sole ground that they are against the manifest weight of the evidence and that the court should have found him not guilty as to Igoe's claim and entered judgment for him in his suit against Russell.

Baba was the only witness who testified as to the manner in which the accident occurred. He was first called by Igoe as a witness under section 60 of the Practice Act (par. 184, chap. 110, Ill. Rev. Stat. 1943) and later as a witness for Russell. According to Baba he was driving his automobile at approximately 20 miles an hour about 6:30 A. M. on August 9, 1942 in a southeasterly direction on Lincoln avenue, Chicago, Illinois, on which there is a car line, on the right side of the street about two feet

1. The first part of the document is a letter from the President of the United States to the Congress, dated January 3, 1862. It is a very long letter, and it contains a great deal of information about the state of the country at that time. The President talks about the war with Mexico, and about the situation in the South. He also talks about the economy, and about the need for more money. The letter is written in a very formal style, and it is very long. It is a very important document, and it is one of the most important documents in the history of the United States.

2. The second part of the document is a letter from the Secretary of the Treasury to the President, dated January 3, 1862. It is a very short letter, and it contains a great deal of information about the state of the Treasury. The Secretary talks about the need for more money, and about the need for more bonds. He also talks about the need for more gold, and about the need for more silver. The letter is written in a very formal style, and it is very short. It is a very important document, and it is one of the most important documents in the history of the United States.

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5. The fifth part of the document is a letter from the Secretary of the Treasury to the Congress, dated January 3, 1862. It is a very long letter, and it contains a great deal of information about the state of the Treasury. The Secretary talks about the need for more money, and about the need for more bonds. He also talks about the need for more gold, and about the need for more silver. The letter is written in a very formal style, and it is very long. It is a very important document, and it is one of the most important documents in the history of the United States.

from the west curb. It was raining and the pavement was wet. Russell's car approached toward Baba's left in a southerly direction on Orchard street. When Baba first saw Russell's car it was about ten feet north of Lincoln avenue. At that time Baba was in the middle of the intersection of Orchard street and Lincoln avenue. He states that Russell's car was traveling over 30 miles an hour. Baba was hit at the southwest corner of the intersection. The right front part of Russell's car struck the left rear fender of Baba's car. Baba lost control of his car, which traveled up over the sidewalk and struck Igoe's parked automobile about 200 feet south of the intersection.

Baba testified that when he first saw Russell's car it was north of Lincoln avenue; that he attempted to get to the curb so Russell's car would not hit him and evidently accelerated his speed. His brakes were in good order and he could have stopped his car within a distance of five feet, but he chose to go forward in an attempt to avert the collision.

Baba contends that his testimony shows that he was free of any negligence and was in the exercise of due care and caution for his own safety and that of others, and his counsel argue that the questions involved are all of fact and undisputed and therefore the court should have determined both cases in his favor.

It is a well settled rule that a reviewing court will not disturb findings of fact unless they are clearly and manifestly against the weight of the evidence. (Shapleigh Hardware Co. v. Enterprise Foundry Co., 305 Ill. App. 180.) The site of the accident was evidently a dangerous intersection and there are "slow" signs for traffic on both streets. According to Baba's testimony his car had just entered the

Winkelhausen

The first part of the work is devoted to a general survey of the history of the art of the Middle Ages. The author begins with the early Christian period, and then proceeds to the Byzantine, Carolingian, and Romanesque periods. He then discusses the Gothic period, which is the main subject of the work. The author then discusses the Renaissance period, and finally the Baroque period. The work is written in a clear and concise style, and is well illustrated with numerous examples of art. The author's knowledge of the subject is evident throughout the work, and his writing is both informative and engaging. The work is a valuable contribution to the study of the history of art, and is highly recommended for anyone interested in the subject.

intersection, while Russell's car had already negotiated more than one-half of the wider street of Lincoln avenue. If Baba's brakes were in good order, he could have stopped his car within five feet, traveling at the rate of speed of 20 miles an hour, as he testified. However, instead of stopping he accelerated his speed and the court was justified in finding from the evidence that this was the proximate cause of the accident. There is nothing in the record to indicate that there was any obstruction to Baba's view at the intersection and he was apparently aware that Russell's car was approaching from the left. In view of the condition of the pavement at the time of the accident it was incumbent upon him to proceed carefully. If he had applied his brakes the accident in all probability would have been averted. The acceleration of speed probably caused the collision, or at least the court would have been justified in so finding. The evidence discloses that Baba's car traveled 200 feet south, then tipped over and struck Igoe's car with such force as to flatten the tires and cave in the whole right side of Igoe's car. It would have required considerable speed to accomplish this result, indicating that Baba probably lost control of his car, partly as a result of the collision and also because of the acceleration of speed immediately prior to the impact.

The trial court was in a better position to pass upon Baba's credibility and the circumstances leading up to the collision than we would be and to determine whether he was in the exercise of due care and caution for his own safety or guilty of the negligence charged. Accordingly the judgments from which the appeal was taken are affirmed.

JUDGMENTS AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

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3. The third part contains the proof of the

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results of the first two parts.

4. In the fourth part we give some

examples and remarks on the

application of the results.

5. The fifth part contains the

concluding remarks and the

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6. The sixth part contains the

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7. The seventh part contains the

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APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

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defendant paid plaintiffs the sum of \$250.00, leaving an unpaid balance of said commission in the sum of \$450.00, for which this suit is brought."

Defendant's motion to strike averred generally that plaintiffs' statement of claim was insufficient in law because it failed to set forth a legal and enforceable contract between the parties, and specifically (1) that "plaintiffs failed to allege that the purchaser they procured purchased the property or was ready, willing and able to purchase the premises for the sale price of \$14,000.00," and (2) that "the property was sold to someone other than their prospective purchaser" and that "plaintiffs are not entitled to commissions for said sale unless they entered in a contract as above set forth, and unless plaintiffs were the exclusive brokers for sale of said property." It may be conceded, as plaintiffs contend, that motions to strike or dismiss a statement of claim admit allegations well pleaded, but the question presented is whether plaintiffs' statement of claim set forth a meritorious cause of action. The law is well settled in this and other states that the broker must find a purchaser in a situation ready and willing to complete the purchase on the terms agreed on, before he is entitled to his commission (Monroe v. Snow, 131 Ill. 126), and that he must be the procuring cause of the sale (Shannon v. Potts, 117 Ill. App. 80). In Cowan v. Day, 156 Ill. App. 105, it was held that all a broker is required to do to entitle him to commission, is to procure a purchaser for the property who is ready, willing and able to buy and complete the purchase.

In the instant case, however, the statement of claim does not satisfy the requirements imposed by the current weight of authority. Plaintiffs content themselves with

the allegation that defendant's tenant purchased the property as the result of their work. They do not allege that they procured the purchaser or were the procuring cause of the sale. The allegation that the sale resulted from their work is a conclusion not admitted by the motion to strike. The court evidently recognized the deficiencies in the statement of claim and afforded plaintiffs an opportunity to amend their pleading but they elected to stand on the original statement, contending that it was sufficient. If plaintiffs had procured the purchaser or were the procuring cause of the sale actually made, for which the commission is claimed, they would presumably have pleaded those facts when given an opportunity to do so. The only connecting link between plaintiffs' services and the actual sale of the property is the conclusion that the sale was effected "as a result of the work of the plaintiffs." Obviously, defendant's tenant was not the purchaser obtained by plaintiffs. They do not allege that they were the procuring cause. We have no means of ascertaining what evidence they could adduce in support of their claim, but obviously if they had procured a purchaser or were the procuring cause of the sale, they would have so alleged. Since they failed to do so, the Municipal court properly sustained defendant's motion to strike and dismiss their statement of claim, and the judgment is therefore affirmed.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

43057

MARTIN J. HEALY et al.,
Appellees,

v.

METROPOLITAN LIFE INSURANCE
COMPANY, a corporation,
Appellant.

APPEAL FROM CIRCUIT

COURT OF COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

brought

An action ^{brought} by Martin J. Healy and May C. Healy, his wife, against the Metropolitan Life Insurance Company, to have deeds, absolute on their face, to four parcels of real estate, declared mortgages, or, in the alternative, if defendant has alienated the properties, that the court decree such sums to plaintiffs from defendant as to compensate them for any damages they have suffered as the result of the alienation. The case was referred to a master in chancery, who filed a report recommending that the complaint be dismissed for want of equity. The chancellor, Judge Fisher, sustained exceptions to the report, found that the equities were with plaintiffs, that defendant had alienated the properties, and decreed that plaintiffs recover from defendant the sum of \$7,309.59. Defendant appeals.

Defendant, in support of its argument that the chancellor erred in sustaining the exceptions to the master's report and in entering the decree, contends: "1. The deeds of conveyance were deeds absolute, executed and delivered in lieu of foreclosure and in order to procure the extinguishment of plaintiffs' indebtedness, pursuant to the terms of a written agreement between the parties. 2. The burden of proving that the deeds of conveyance were not intended to be absolute but were by agreement of the parties mere additional security for the debts is upon the plaintiffs. 3. To constitute an

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instrument, in form a deed, a mortgage there must be (1) a debt owing by the owner of the real estate, (2) an intention of the parties that the conveyance is made as security for that debt and (3) a provision, express or implied, for a defeasance."

Plaintiffs contend that the evidence is clear and convincing that the deeds of conveyance were not intended to be absolute, but were in fact given as additional security; that they were in fact mortgages and so intended by the parties.

The decision in this case depends upon the intention of the parties at the time the deeds were executed and delivered. The law that bears upon the question before us is well established. A deed absolute in form, if intended as a security, is in equity but a mortgage, and will be treated as such even though the agreement rests only in parol. Here from all the facts and circumstances it appears that the conveyance in fact is but an indemnity or security, it will be held a mortgage, no matter what is the form of the transaction. (Carter Oil Co. v. Durbin, 376 Ill. 398; Illinois Trust Co. v. Bibb, 328 Ill. 252.) The character and legal effect of the instrument is determined by the intention of the parties at the time it was executed and delivered. (Kulik v. Kapusta, 303 Ill. 208, 213; Totten v. Totten, 294 Ill. 70, 80.) The burden of proving that the deeds of conveyance were not intended to be absolute but were in fact given as additional security for the debts is upon the plaintiffs, and the proof must be clear and convincing.

In Kulik v. Kapusta, supra, the court states (pp. 212, 213, 214):

"* * * Section 12 of Chapter 95 of the Revised Statutes provides that every deed conveying real estate which shall

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appear to have been intended as a security in the nature of a mortgage, though it be an absolute conveyance in terms, shall be considered as a mortgage; (2 Murd's Stat. 1921, p. 2150;) and this court has consistently held since the decision rendered in Ruckman v. Alwood, 71 Ill. 155, that parol or extrinsic evidence will be admitted to show that a deed was intended as a mortgage. The decisions also hold that the burden of proof rests upon the one asserting a deed absolute in form to be a mortgage to show that fact by clear and satisfactory proof. (Deadman v. Yantis, 230 Ill. 243; Totten v. Totten, 294 id. 70; Rankin v. Rankin, 215 id. 132.) A conveyance takes effect from its delivery, and the question whether it was a deed or a mortgage becomes fixed at that time. (Dearss v. Ford, 108 Ill. 16.) The decision of that question depends upon the intention of the parties at the time of the execution. Parol evidence is admissible to show a conveyance in form absolute or on condition to be a mortgage, not only as between the parties and their successors but also as against one who derived his title from the grantee without paying any valuable consideration therefor. (19 R. C. L. 254.) The inquiry in cases of this class may properly include the facts and circumstances tending to illustrate the purpose and intent of the parties in the transaction. (Darst v. Murphy, 119 Ill. 343.) The preliminary negotiations leading up to the transaction, as well as the statements of the parties at and after the execution of the instrument, may be admitted. The court is not restricted to any particular kind of evidence, but may take into consideration almost any pertinent matters which tend to prove the real intention and understanding of the parties and the true nature of the transaction in question. (27 Cyc. 1019.) While there can be no question that the burden

of proof rests upon the party asserting that the instrument is, in fact, a mortgage and was so intended by the parties, yet that does not necessarily mean that there shall be no conflict in the testimony on the question. Positive evidence of the intention is not required. It is sufficient if the evidence is clear and convincing, even though conflicting. 8 Ency. of Evidence, 718; Totten v. Totten, supra; see, also, the reasoning in L. R. A. 1916B, 46, 47, 235, and cases cited in note."

This brings us to a consideration of the material facts and circumstances that bear upon the question of intent. The following facts are not in dispute: Martin J. Healy, one of the plaintiffs, and Paul J. Healy, his brother, were associated in the real estate business. In September, 1940, plaintiffs were liable on fourteen mortgages owned by defendant. Thirteen of the mortgages were executed in 1931 and one in 1930. Each mortgage was on one parcel of property. All of the properties were in the same neighborhood. For a period of nine or ten years plaintiffs paid to Great Lakes Mortgage Corporation (hereinafter called Mortgage Corporation), the agent of defendant, all of the installments of principal and interest that fell due on the fourteen mortgages. During that period plaintiffs dealt solely with Mortgage Corporation in all matters relating to the mortgages, including extensions of time for payments. Mortgage Corporation held itself out, on its letterheads, as the "Mortgage Loan Correspondent" of defendant. In October, 1940, plaintiffs were two months in arrears on payments due on the fourteen mortgages, and in that month Mortgage Corporation notified plaintiffs that it would have to foreclose upon the mortgages. A conference then took place between Paul J. Healy and

Leon C. Wolfe, secretary of Mortgage Corporation. What was said at that time is a matter of dispute, and we will hereafter refer to the several versions. Robert W. Lingard, the president of Mortgage Corporation, testified that Wolfe, acting for that company, handled the entire Healy transaction. Wolfe prepared and delivered to Paul Healy for signature of plaintiffs a bargain and sale deed, a settlement agreement, a deposit agreement and an estoppel affidavit as to each of the fourteen properties. Plaintiffs signed all of the documents on October 9, 1940, and Paul Healy returned them to Wolfe about that date. Plaintiffs were not paid anything for executing the deeds. The evidence clearly shows that at the time of the signing of the deeds each of the fourteen properties had a market value greatly in excess of the amount due upon the mortgage covering it. After the delivery of the instruments plaintiffs put on a sales campaign to sell all of the properties, and they advertised the properties for sale in the Chicago Tribune for three Sundays. In a short time they obtained buyers for most of the properties and secured sufficient money to pay up a large part of the delinquencies then due on the properties. Healy then informed Wolfe that he had buyers for certain of the properties and money to pay on the delinquencies, and Wolfe said that Healy would have to designate the properties that he wanted the payments to apply on. Healy then designated the properties, the delinquencies on the same were paid, and the deeds to said properties were returned to plaintiffs. In this manner Paul Healy, acting for plaintiffs, paid the delinquencies due upon ten of the properties, and the deeds as to the ten were returned to plaintiffs. None of these ten deeds had been recorded. Payments on certain of the ten properties were made as late as November 18, 1940. Wolfe testified that about October 25, 1940, defendant sent back to him all of the documents that had been executed

by plaintiffs and its acceptance of the "settlement agreements." Nineteen days after the deeds were executed and delivered to Wolfe, and three days after Wolfe had received back from defendant all of the documents and its acceptance of the "settlement agreements," Mortgage Corporation, through Wolfe, sent a letter to Paul J. Healy. The carbon copy of the same reads as follows:

"October 26, 1940.

"Mr. Paul J. Healy
"77 West Washington Street
"Chicago, Illinois

"Dear Mr. Healy:

"We have attempted to call you daily since you failed to come in Friday at noon with the clear titles, in accordance with your agreement.

"If we do not hear from you by twelve o'clock noon, Tuesday, October 29, 1940, we shall assume you are unable to clear the titles and shall forward the mortgages on those properties on which the titles are not cleared to the attorneys for foreclosure. [Italics ours.]

"Very truly yours,

"Secretary."

Wolfe testified that the foregoing letter refers to certain of the ten properties where the deeds were afterward returned to plaintiffs. It is conceded that plaintiffs cleared the titles to the properties mentioned in the letter. On October 31, 1940, Wolfe called up Paul Healy and told him that they were going to put the balance of the deeds on record, and Healy said, "Hold them up until I get over there. I will try to get you some money today." Healy then went over to Wolfe's office and paid a certain sum of money to Wolfe and it was applied on two or three of the properties, and it paid in

full the amounts due on the said properties. There then remained five of the properties upon which there were delinquencies. Wolfe stated in that conversation that defendant had executed the agreements of settlement and that he would have to record the remaining deeds, and Healy asked Wolfe to withhold the recording of the deeds. Healy testified that he stated to Wolfe on October 31, 1940, "that we would have the funds to pay up the balance of the five remaining at that time, which he threatened to put the deeds of record, that I would have those funds in a very short time;" that he had applied for his United States Veterans' insurance and that it was then due. Wolfe testified that he does not remember if Healy made the foregoing statement. Healy further testified that he received his Veterans' insurance two days later and turned it over to Wolfe. On October 31, 1940, or the next day, the deeds to three of the four properties in question were recorded. The deed to one of the properties, 8936 S. Elizabeth street, was not recorded until November 13, 1940. At that time Healy had made payments to apply upon the delinquencies as to that property. The mortgage notes upon the four properties were never returned to plaintiffs. Wolfe testified that he cancelled the notes and sent them and the mortgages to defendant. The latter kept them and produced them upon the hearing, at which time the notes bore cancellation marks and also the following indorsement: "Paid by delivery of deed in lieu of Great Lakes Mortgage Corporation". Wolfe further testified that at the time of the talk with Healy on October 31, 1940, Healy paid the delinquencies on one of the properties and Wolfe gave Healy the deed to that property; that on November 12, 1940, Healy paid the delinquencies on another one of the properties and Wolfe gave Healy the deed to that property; that a similar transaction took place November 15, 1940, as to

another one of the properties. During the examination of Wolfe the following occurred: "Q. You testify that when he came in on the earlier date in October that he had to designate certain properties, is that true? A. That is right. Q. Now you were holding deeds at that time for fourteen properties, were you not? A. Yes. Q. And out of how many properties did he have a right to designate? Out of the entire fourteen? A. He could designate any that he had sales on. Q. He could designate any one of the four properties involved in this suit, couldn't he, at that time? A. Yes." After the deeds to the four properties in question had been recorded, plaintiffs, by letter and oral statements, made bitter protests against the action of Wolfe in recording the four deeds. Within a few months after the recording of the deeds defendant sold the four properties at a substantial profit. The undisputed evidence shows that the market value of the four properties, on October 9, 1940, far exceeded the amounts then due on the mortgages. Each of the properties was 30 feet by 125 feet and was improved with a five-room brick bungalow that was furnace heated, and had a two-car garage. On December 27, 1940, at the suggestion of Wolfe, Paul Healy, in the name of himself and wife, made written offers to defendant to purchase the four properties, but defendant declined the offers on the ground that it had already accepted prior offers. Paragraph (5) of the settlement agreements executed by plaintiffs and defendant provides: "Said second party now owns said mortgaged premises and desires to procure the cancellation and extinguishment of said mortgage indebtedness, and desires and has proposed to convey to the first party a good title to said real estate by Bargain and Sale Deed, with release of dower and homestead rights, * * *

in payment and satisfaction of said mortgage indebtedness, and said first party is willing to accept, and has accepted, said proposition so made by the second party." Defendant argues that the foregoing provision conclusively shows the intentions of the parties at the time of the execution of the deeds. The execution and delivery of the deeds, the settlement agreements, the deposit agreements and the estoppel affidavit constituted but one transaction, and while the aforesaid language of paragraph (5) is a circumstance tending to support defendant's contention that the deeds of conveyance were deeds absolute, it does not determine the question of intent, as defendant argues. Where from all the facts and circumstances in evidence it appears that the conveyance in fact is but an indemnity or security, it will be held a mortgage no matter what is the form of the transaction. (Carter Oil Co. v. Durbin, 376 Ill. 398; Illinois Trust Co. v. Libo, 326 Ill. 252.) If defendant's argument were followed, a mortgage holder could nullify the established law and prevent the mortgage debtor from proving the actual intent of the parties at the time of the execution of a deed by having him execute an instrument like the settlement agreements in the instant case. Plaintiffs contend that the evidence shows that they were so anxious to save their properties that they would have signed any papers that defendant demanded, and they argue, with some force, that the number and character of the instruments that defendant had plaintiffs execute tend to weaken defendant's contention as to the actual intention of the parties at the time of the execution of the deeds. In determining the question of the intention of the parties when the deeds were executed, we have given proper consideration to the language in the settlement agreements upon which defendant relies.

To refer to certain disputed evidence that bears upon the intent of the parties when the fourteen deeds were executed and delivered: Paul Healy testified that about September 25, 1940, he was called to the office of Mortgage Corporation and informed by Mr. Koranda, an employee of that company, that the two payments then due would have to be made very shortly; that he told Koranda that he would be able to do that; that Koranda said, "You can have another week or ten days or two weeks;" that Koranda called him up a couple of weeks later; that he was then unable to make the payments; that Koranda said to him, "'Well, why didn't you sell one of these properties to me?' I said, 'Well, how much will you give me?' He says, 'I will give you a couple of hundred dollars.' I says, 'No, we wouldn't sell it for anything like that. We are going to have this money in here in a few days and we will have the whole thing cleared up;'" that Koranda then took him to see Mr. Green, one of the officers of Mortgage Corporation, and Green brought them over to Wolfe, who stated that they would have to go through with foreclosure proceedings unless the payments were made in a few days; that he, Healy, then said, "'* * * We don't want you to foreclose because it is only going to mean the increase of expense by sending them over to the lawyers' office, and we will have Master's fees and attorneys' fees and recording fees, and so forth.' 'And', I says, 'to evidence my good faith that we will pay these amounts in a very short time I will see that you have deeds so that you won't have to foreclose;'" that Mr. Wolfe then gave him one week to get the money in and that Wolfe called him over to the office again and asked him if he would be willing to give the deeds, and he stated that they would; that Wolfe stated that they would prepare the necessary papers and that he, Healy, could pick them up about October 5; that on October 5 he saw Wolfe and "told him that

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we would definitely pick up the delinquencies within a very short time, and asked him to give us a couple more weeks, two or three more weeks. Q. What did he say? A. And he handed me the papers and said that we would have time, and to get the papers executed and back in his possession;" that he had plaintiffs execute the papers that were given him by Wolfe and that he then delivered the papers to Wolfe; that, at the same time, "I told Mr. Wolfe definitely, - I says, 'You are not going to get the title to these properties. We are going to be able to pay up these delinquencies in a very, very few days.' 'Now,' I says, 'it is clearly understood that if I come in here in a week or ten days or two weeks with a substantial amount of money or with a definite new purchaser to be approved by your organization, then we will get more time.' And Mr. Wolfe says, 'That's right.'" The witness then stated that he thereafter paid Mortgage Corporation "money at different times and brought them in new purchasers who signed modification agreements with the Great Lakes Mortgage Corporation, and which modification agreements were approved by the Metropolitan Life Insurance Company;" that on October 25, 1940, he "gave Mr. Wolfe the check for \$500.00. And Mr. Wolfe asked me which properties I wanted this payment to apply on. And I said, 'Mr. Wolfe, we are going to pay the entire delinquency. You can apply the five hundred against the entire Healy group, and I will be in here next week or a few days with the balance of the payments.' * * * Mr. Wolfe says, 'We can't handle it that way. You have got to select yourself which properties you want this applied on.' And then he called Mr. Koranda, and I believe the bookkeeper was called, and a receipt and notations were made in their books as to which properties this \$500.00 was to be applied on. He further

stated that every time I made a payment I should designate the properties upon which these payments were to apply."

The witness further testified that on December 8, 1940, he called on Mr. Wingard, the president of Mortgage Corporation, and told him that he thought that he got "a -- damn rotten deal, that I showed my good faith by bringing over all these deeds and all the papers that they had presented to me for signature, that I had brought them in to Mr. Wolfe and followed his instructions, and it was clearly a -- I was told that I would get time to indicate again my good faith by making some payments or selling the properties to approved purchasers, and ^{when} then/I did that I would be given more time. And I says, 'I have been in to see Mr. Wolfe several times and I have protested very strongly against the recording of these deeds.' And I says, 'Previous to this I have always been treated very fairly by the Metropolitan Life Insurance Company', and I thought I was treated very unfairly here; that I wanted the properties back and that I would do anything that they wanted me to do to get the properties back. Mr. Wingard said that he didn't know very much about it, and he called Mr. Wolfe in, - he called Mr. Wolfe into the conference. And I repeated again what I had said to Mr. Wolfe. And Mr. Wingard says, 'Well, how about that, Mr. Wolfe?' Mr. Wolfe says, 'Yes, he did do a darned good job; he went out and raised the money or sold enough to clear up ten of them in about three weeks' time.' And he says, 'But we did record the other four deeds.' And he said, 'He protested against it very strongly at the time.' Mr. Wingard suggested that I write a letter to him, which he would forward to the Metropolitan Life Insurance Company in New York. And I went back to my office and dictated a letter to my secretary, and that is the letter we have just read a moment ago." Leon Wolfe testified that Paul Healy, about October 5 or 6, stated

that he wished to avoid the delivery of the mortgages to the attorney for defendant for foreclosure and in lieu of sending them to the attorney he would deliver deeds to the defendant - he would execute agreements to defendant in which he would agree to deliver deeds in lieu of foreclosure; that he did not say anything at that time about his getting the properties back; that Healy, on October 9, 1940, did not state, "I told him that we would definitely pick up the delinquencies within a short time, and asked him to give us a couple more weeks, two or three weeks;" that at the time the two Healys brought in the papers he told Paul that if he brought in any buyers before the settlement agreements were signed by defendant and returned to Mortgage Corporation and the deeds delivered, Mortgage Corporation would submit his buyers to defendant and ask them to consider the buyers and the reinstatement of the loans; that he told him the defendant would consider any proposal; that Paul Healy never stated to him, "Now, is it clearly understood that if I come in here in a week or ten days or two weeks with a substantial amount of money or with a definite new purchaser to be approved by your organization then we will get more time?" that about October 3 or 4, 1940, Paul Healy stated that it could avoid judgments against his brother if he delivered deeds to defendant in lieu of foreclosure; that the witness agreed with him that it would be mutually beneficial; that Paul Healy did not say, "To evidence my good faith that we will pay these amounts in a very short time, I will see that you have deeds so that you won't have to foreclose;" that he could not remember Paul Healy's stating, "Mr. Wolfe, we are going to pay the entire delinquency," October 31; that he could not remember if Paul Healy said to him on October 31 or the next day, "Mr. Wolfe, we will

The first part of the paper is devoted to a general discussion of the problem of the origin of life. It is shown that the problem is not only one of the most important but also one of the most difficult in the history of science. The author points out that the problem has been discussed since the earliest times, but it was only in the last few decades that it has become a subject of serious scientific investigation. The author then discusses the various theories of the origin of life, including the theory of spontaneous generation, the theory of biogenesis, and the theory of abiogenesis. He then discusses the evidence for each of these theories, and finally he concludes that the theory of abiogenesis is the most plausible.

The second part of the paper is devoted to a detailed discussion of the theory of abiogenesis. The author shows that this theory is based on the fact that the conditions of the early earth were such that the formation of organic molecules was not only possible but also probable. He then discusses the various steps in the formation of life, from the formation of the first organic molecules to the formation of the first living cells. He shows that each of these steps is supported by a large amount of evidence, and he concludes that the theory of abiogenesis is the most plausible.

The third part of the paper is devoted to a discussion of the various problems that are still outstanding in the study of the origin of life. The author points out that there are many questions that have not yet been answered, and he discusses the various methods that are being used to try to answer these questions. He then discusses the various theories that have been proposed to explain the origin of life, and he concludes that the theory of abiogenesis is the most plausible.

The fourth part of the paper is devoted to a discussion of the various implications of the theory of abiogenesis. The author shows that this theory has many important implications for our understanding of the history of life on earth, and he discusses the various ways in which this theory is being used to try to answer some of the most important questions in the history of science. He then discusses the various ways in which this theory is being used to try to answer some of the most important questions in the history of science.

have the funds to pay up the balance of the five remaining and that I will have these funds in a very short time." The witness admitted receiving payments from Paul Healy on certain of the properties during the month of November, 1940; that they had records of defaults in their books in reference to the four properties in question that showed defaults on October 1 and November 1, but that said records had no application as there were no loans on said dates. Mr. Wingard testified that in the conversation between Paul Healy, Wolfe and the witness Healy did not ask the witness for the return of the deeds, but that he may have asked Wolfe to return them. Defendant introduced in evidence an undated memorandum, apparently signed by Paul J. Healy, which reads as follows: "Key to 8918 S. Elizabeth st. Water is shut off. Everything is drained Paul J. Healy."

The chancellor gave the following reasons for overruling the master's report:

"The Court [Judge Fisher]: I am going to overrule the Master. There can be no doubt at all that these four deeds were part of a single transaction in which 14 deeds were executed. The insurance company held mortgages on 14 pieces of property. Some delinquencies developed as to each. The delinquencies were rather small amounts and upon the insistence of the insurance company that they be paid, an arrangement was made whereby the mortgagor was to execute absolute deeds to all the property.

"There was some controversy as to what the conversations were at the time, the mortgagor claiming that it was specifically agreed that he was to have the right to sell the property and as he brought in the money deeds would be issued to the new purchaser, the mortgagee claiming that there was no such agreement and it relies upon a specific written agreement in which it is recited that it was a settlement between the parties

resulting in an absolute conveyance. But following the delivery of these deeds the parties continued to treat them as mortgages and 10 of the 14 pieces of property were, in fact, redeemed.

"No specific agreement is shown or claimed with respect to any of the pieces of property which were intended to be absolute conveyances and those which were intended to be redeemed upon the payment of the deficiency - the mortgagor, the plaintiff in this case, could as well have indicated any of these pieces of property to be redeemed when he brought in the money. All he needed to do was to bring in certain sums of money at any time and he could get his deed back or a reconveyance. To insist as to those particular four pieces of property that the transaction was absolute when, in fact, it was not only a transaction simultaneously involving several pieces of property, but was, in fact, a single transaction - to so insist is hardly compatible with the conduct of the parties after the execution of these deeds. There are those familiar maxims of equity, 'Once a mortgage, always a mortgage,' and 'Equity will look beyond the form.' The mere fact that a written agreement was entered into, when the conduct of the parties is convincing proof that there was no intention to treat this as a final and complete settlement of the transaction between the parties, does not preclude the Court's holding that the agreement does not express the real intent of the parties. In fact, such an agreement entered into in writing, may, under the circumstances, be considered as additional evidence that what was really happening was the deeds were executed as additional security and that a conscious effort was made on the part of the parties to cover up the real office of those deeds.

"I shall hold that the deeds were not intended to be absolute conveyances, but simply formed additional security and that the plaintiff had not lost his right of redemption."

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1. The first part of the paper is devoted to the study of the asymptotic behavior of the solutions of the system (1) as $t \rightarrow \infty$. It is shown that the solutions of the system (1) tend to zero as $t \rightarrow \infty$ if and only if the matrix A is Hurwitz.

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A careful consideration of the material facts and circumstances satisfies us that the judgment decree should be affirmed. In giving his reasons for his ruling Judge Fisher undoubtedly had in mind the important fact that Wolfe testified that when Healy made payments after the fourteen deeds had been delivered to Wolfe the former had a right to make the payments apply on any of the fourteen properties; that he could have designated any one of the four properties involved in this suit and that it followed from Wolfe's testimony that if Healy had designated any one of the four properties the deed to that property would have been returned to plaintiffs. In the letter of October 28, 1940, written nineteen days after the deeds were executed and delivered to Wolfe and three days after Wolfe had received back from defendant all of the documents and its acceptance of the settlement agreements, Wolfe still claimed the right to foreclose the mortgages on certain of the properties if Healy did not clear up the titles to the same "by twelve o'clock noon, Tuesday, October 29, 1940." We find certain mountain peaks in the evidence that tend strongly to support Judge Fisher's holding: (1) Aside from the amounts due defendant under the mortgages the latter paid no consideration to plaintiffs for the deeds, and in view of the fact that the value of the properties was greatly in excess of the amounts due defendant under the mortgages, why should plaintiffs have given defendant absolute conveyances to the properties? The uncontradicted evidence shows that the properties were readily salable and at figures far in excess of the amounts due under the mortgages. "If the value of the mortgaged premises greatly exceeds the debt secured by the mortgage, the fact of such excess will tend to show that a release was not intended, (1 Jones on Mtgs. secs. 267 and 340 - 4th ed.)" (Burton v.

Perry, 146 Ill. 71, 114.) (2) If the deeds were absolute plaintiffs lost all interest in the properties. Why then should they have put on the selling campaign? (3) None of the mortgage notes or trust deeds upon the four properties were returned to plaintiffs and defendant was still in possession of the notes and trust deeds at the time of the hearing. "The intention to pay the debt by a deed of the property will not be inferred, where the creditor retains the evidences of the indebtedness, and the securities pledged for its payment. (Sutphen v. Cushman, 35 Ill. 186; Knowles v. Knowles, 86 id. 1; Dunphy v. Riddle, id. 22; Bearss v. Ford, 108 id. 16)." (Burton v. Perry, supra, 114.) Defendant's answer to this point, that the Healys never demanded the notes, is not persuasive, especially in view of the fact that plaintiffs were insisting that the deeds were not intended to extinguish the mortgages. If plaintiffs had intended that the deeds were to be absolute, they would, of course, have demanded the mortgage notes. Defendant did not even offer plaintiffs the notes. Cases cited by defendant (Kimmel v. Bundy, 302 Ill. 514, and Swinson v. Sodaman, 300 Ill. App. 31) differ from the instant proceeding upon the facts. Certain facts and circumstances create a strong inference that Wolfe, after he saw that plaintiffs were able to quickly sell ten of the properties at a profit, concluded to treat the four deeds in question as absolute^{and} to thereby make a substantial profit for defendant. Defendant seems to realize that if the intent of the parties is to be determined by the conduct of the Healys and the officials of Mortgage Corporation plaintiffs must prevail, for its final contention is that neither Mortgage Corporation nor Wolfe was authorized to enter into the alleged agreement with Paul Healy; that said agreement, to make it binding, would have to be submitted to the proper officers of defendant in New York; that there is no evidence that Mortgage

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Corporation or Wolfe were agents of defendant for the purpose of receiving title; that the instruments in question were deposited by Paul Healy not with Mortgage Corporation but with Wolfe and that the deposit was a "deposit in escrow;" that "it was prior to the signing by the defendant through its duly authorized officers at the home office of the settlement agreements * * *, that the defendant permitted Healy to make new arrangements on certain of the properties for which deeds were delivered in escrow on October 9, 1940," but that said permission was an "indulgence of the defendant" pending the acceptance of the settlement agreements by defendant, and that to affirm the instant judgment would be to penalize defendant for its indulgence. Defendant had its office in New York and for nine or ten years plaintiffs dealt solely with Mortgage Corporation in the matter of the mortgages. Plaintiffs had the undoubted right to show the intention of the parties at the time the deeds were executed and delivered, but this right would be an empty one, indeed, if they were precluded from showing the facts and circumstances surrounding the execution and delivery of the deeds. It would be highly inequitable, under the facts, to permit defendant to now hide behind Mortgage Corporation and Wolfe. The evidence shows that after Wolfe received the documents back from defendant on October 25, 1940, plaintiffs paid the delinquencies on a number of the properties and received back deeds for the same. "A delivery to the agent of the grantee has the same effect as a delivery directly to the grantee. (Clark v. Harper, 215 Ill. 24). A deed may be delivered to a third person for the benefit of the grantee, and, if the grantee subsequently accepts the deed, the delivery is as good as though made directly to the grantee. (Rodemeier v. Brown, 169 Ill. 347; Walter v. Way, 170 id. 96)." (Coleman v. Coleman, 216 Ill. 261, 267.) The strained contention of defendant that plaintiffs delivered the

deeds, not to Mortgage Corporation but to Wolfe, individually, does not merit serious consideration.

Defendant further contends that even though plaintiffs proved that it was not their intention that the deeds were to be absolute, nevertheless, plaintiffs, in order to make out a prima facie case, would have to prove that it was the intention of defendant that the deeds were not intended to be absolute. Without conceding that this contention states a correct proposition of law, it is sufficient to say that the evidence justified the finding of the chancellor that neither of the parties intended that the deeds were to be absolute conveyances.

The judgment decree of the Circuit court of Cook county is a just one and it is affirmed.

JUDGMENT DECREE AFFIRMED.

Sullivan, P. J., and Friend, J., concur.

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43108

LEWIS G. POWELL and JOEL POWELL,
by LEWIS G. POWELL, his next
friend,

Plaintiffs-Appellees,

v.

AARON B. WEINER, doing business as
130 N. PARKSIDE BLDG.; H. LAWRENCE
HENDRICKSON, Successor Trustee
under Trust Agreement dated October
1, 1935, creating 130 NORTH PARKSIDE
LIQUIDATION TRUST #745, and CHICAGO
COIN METER COMPANY, a corporation,
Defendants.

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

AARON B. WEINER,
Defendant-Appellant.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

An action by Lewis G. Powell and Joel Powell, by
Lewis G. Powell, his next friend, to recover damages that
resulted from an injury to Joel Powell. The case ^{was} tried
before the court and a jury. At the conclusion of all the
evidence H. Lawrence Hendrickson, Successor Trustee, defend-
ant, was dismissed from the case on motion of plaintiffs.
The motions of defendants Aaron B. Weiner, doing business
as 130 N. Parkside Bldg., and Chicago Coin Meter Company
for directed verdicts were denied. The jury returned a
verdict in favor of Chicago Coin Meter Company, defendant,
as to both plaintiffs; also a verdict in favor of Lewis G.
Powell for \$1,677.48 against Weiner, and a verdict in favor
of Joel Powell for \$2,500 against Weiner. Motions of de-
fendant Weiner for judgments notwithstanding the verdicts,
motions for a new trial as to each verdict, and a motion in
arrest of judgment as to each verdict were denied and judgments
were entered against defendant Weiner on both verdicts. De-
fendant Weiner appeals.

The complaint consisted of four counts. The first

count alleged, in substance, that Hendrickson, as Trustee, defendant, owned a large apartment building at 130 North Parkside avenue, Chicago; that Weiner, defendant, managed and operated the building; that Chicago Coin Meter Company, defendant, was in the business of leasing and vending electrically operated washing machines and on June 25, 1941, had one of said machines with wringer attached located in a room on the ground floor of the said building; that to use the machine it was necessary to put a deposit of ten cents in a device attached to it; that the machine was intended for and used by such of the tenants as desired to use it upon the deposit by them of ten cents in the said device; that if the washing machine was used for less than twenty minutes the equipment would operate for the unused portion of the twenty minutes by inserting the wire and plug attached to the equipment in an electrical socket; that Lewis G. Powell and his family occupied an apartment in the building and that Joel Powell, a son of Lewis, was a child of, to wit, four years of age; that the washing machine was attractive to children of tender years residing in the building; that defendants knew, or by the exercise of reasonable care could have discovered and known, that the washing machine and wringer were located in an unlocked room and they were inherently dangerous and attractive to children of tender years, and they were easily accessible to said children, who, by playing in and around the equipment, might be seriously injured; that defendants negligently failed to lock the door to the room where the washing machine was located and to equip the machine with a device to prevent its automatic operation by the plugging into an electric socket of the wire connection attached to the said washing machine and wringer; that defendants negligently permitted, invited and enticed children of tender years to come in and play on, around and about the washing machine and wringer;

that Joel Powell on June 25, 1941, while in the exercise of due care for his safety, consistent with his age, was enticed and invited by the exposed washing machine and wringer and went into the room to investigate and play with it; that he caused the electric current to start by inserting the wire connection in the socket, caught his right hand in the wringer, and by reason thereof was injured; that Lewis G. Powell, plaintiff, the father of Joel, was at all times in the exercise of due care for the safety of Joel Powell; that Lewis G. Powell was put to great expense in securing doctors, medicine, nursing and hospital care for Joel, due to the said injuries received, and damages were asked in the sum of \$10,000. The second count was the same as the first save that Joel Powell, by Lewis G. Powell, his next friend, was the plaintiff, and damages were asked for the injuries that he sustained. The third and fourth counts made practically the same allegations as the first and second counts save that the third and fourth counts did not allege that children were attracted, enticed and invited into the room by the washing machine and wringer, and they also contained the following allegations: That the machine and wringer were inherently dangerous, particularly to the children of the tenants in the building, in that if a person using the machine and wringer had not fully used the electrical current and had pulled the plug from the socket after using the machine and wringer, the machine and wringer could be started by plugging the wire into the wall socket; that defendants knew or in the exercise of ordinary care ought to have known said facts but they nevertheless permitted the door to the laundry room to stay open and unlocked and allowed children of tender years "to come in and play in, around and about the said washing machine and wringer;" that by reason of the aforesaid facts Joel Powell, who had gone into the laundry room to hide, saw

the machine with the wringer attached, plugged the wire into the socket, causing the wringer to operate, which caused his injury; that defendant permitted children to come in and play in, around and about the washing machine and wringer, and by plugging the wire connection into the easily accessible wall socket, Joel Powell started the washing machine and wringer to operate and was thereby injured.

Aaron B. Weiner, defendant and appellant, operated a forty-four apartment building at 130 North Parkside avenue, Chicago. Lewis G. Powell rented an apartment on the second floor of the building and he; his wife, Berdie; his son, Joel Powell, and his two daughters, Joyce and Sandra Powell, occupied the apartment. All of the tenants in the building had the right to the use of the basement, the laundry room, the washing machine and wringer. Joel Powell, the son of Lewis Powell, was a member of his family and was in no sense a trespasser at the time of the accident. The janitor of the building, Otto Herzog, stated that there were a good many children living in the building. The Powells had lived in the premises for two and one-half years prior to the accident, which occurred about five o'clock p. m., June 25, 1941. Joel Powell was then four years and ten months old. At the rear of the building there is a walled passageway that leads into the basement and the Powell family and other tenants sometimes used this passageway in going to their apartments. The laundry room, in which the electrically operated washing machine and wringer were located, is walled off from the rest of the basement and is entered through a door. By dropping a dime in a slot and then plugging the electric cord into a socket in the wall the machine would operate for twenty minutes. While the machine was operating the wringer could be turned on and off by a button. The socket in the wall was located somewhere between three and

four feet above the floor. The laundry room and washing machine were for the use of all of the tenants and the door to that room was never locked except at night. The tenants were not furnished keys to that door. In going along the passageway in the basement one could see a part of the laundry room. On the day of the accident Joel and his two older sisters returned home from the school playground and entered the rear of the building through the basement passageway. Joel ran into the laundry room to hide from his sister Joyce and the wind blew the door shut. Joyce, who was then in the passageway, turned the knob of the door to open it but found it locked. In a few minutes she heard a noise in there and ran upstairs to the apartment of Mrs. Montgomery, the resident manager of the building, to get a key to the laundry room. Mrs. Montgomery, who was subsequently married to a man named MacKey, and Joyce went back to the basement; Mrs. Montgomery had a key to the laundry room, but when they got to the door of the laundry room Joel had opened the door and was standing there holding his right hand behind him. The child sustained serious injuries to his right hand, but as there is no contention that the damages awarded are excessive it is unnecessary for us to detail the injuries he sustained. Several witnesses for plaintiffs testified that they had seen children playing in the laundry room prior to the accident; that children kept boxes there that they used for lemonade stands. Otto Herzog, the janitor, did not live in the building. He testified, for defendant, that he had never seen children playing in "the wash room" and that he did not know of any children that played there. To impeach this testimony plaintiffs called Bernard L. Drake, an investigator for the attorney for plaintiffs, who testified that he had talked with Herzog about the accident and that Herzog told him that on occasions before

the accident he had chased boys and children out of the laundry room. Herzog was also the janitor of another apartment building close to the one where the accident occurred and there was a laundry room in that building similar to the one in the building in question. After Drake had testified Herzog again took the stand and admitted that he had talked with Drake but that he "didn't tell him anything about the other children;" that "I told him my frau and the manager of the building chased them out from 154," the other building in which he was janitor, and that Joel Powell was one of the children they chased out. The building in which the accident occurred is numbered 130. Mrs. Anne MacKey (formerly Mrs. Montgomery) the resident manager of the building, called by defendant, was not asked by his counsel whether she had ever seen or heard of children playing in and around the washing machine in the laundry room, but she was asked whether she knew of any children being injured in that room prior to the accident to Joel.

Defendant contends that the trial court should have directed verdicts in his favor and should have entered judgments for him notwithstanding the verdicts.

Rule 22 of the Supreme court provides: "The power of the Court to enter judgment notwithstanding the verdict may be exercised in all cases where, under the evidence in the case, it would have been the duty of the Court to direct a verdict without submitting the case to the jury."

"A motion to instruct the jury to find for the defendant is in the nature of a demurrer to the evidence, and the rule is that the evidence so demurred to, in its aspect most favorable to the plaintiff, together with all reasonable inferences arising therefrom, must be taken most strongly in favor of the plaintiff. The evidence is not weighed, and all contradictory evidence or explanatory circumstances must be rejected. The

question presented on such motion is whether there is any evidence fairly tending to prove the plaintiff's declaration. In reviewing the action of the court of which complaint is made we do not weigh the evidence, - we can look only at that which is favorable to appellant. Yess v. Yess, 255 Ill. 414; McCune v. Reynolds, 283 id. 188; Lloyd v. Rush, 273 id. 489. (Hunt v. Troup, 315 Ill. 293, 296, 297.)" (Mahan v. Richardson, 284 Ill. App. 493, 495. See, also, Holever v. Curtiss Candy Co., 293 Ill. App. 516, 517; Cooper v. Safeway Lines, Inc., 304 Ill. App. 302, 312, 313; McCarthy v. Morrison, 283 Ill. App. 129; Rose v. City of Chicago, 317 Ill. App. 1, 12.)

This is not an attractive nuisance case, although a considerable part of the brief of defendant is based upon the assumption that plaintiffs treated it as such.

Plaintiffs state that the attractive nuisance doctrine is not in this case because the boy was not a trespasser at the time of the accident, and they practically concede that their case is based upon counts three and four. The question of contributory negligence is not present because Joel Powell was less than five years of age at the time of the accident. Defendant argues that the washing machine and wringer located in the laundry room of the basement did not constitute an attractive nuisance, and cites in support of the argument a number of attractive nuisance cases where the injured party was a trespasser, but these cases have no application to the facts in the instant case. In passing upon defendant's motions the material questions for the trial court to decide were: Did plaintiffs' evidence tend to prove that this washing machine with an electrically operated wringer placed in the basement for the use of tenants, to which children had access at all times through an open and unlocked door, was of an

inherently dangerous nature to young children who might be attracted by it and play with it? Did plaintiffs' evidence tend to prove that defendant knew, or by the exercise of ordinary care should have known, that children of tender years might be attracted by it and might play with it, and thereby be exposed to injury? The trial court properly answered these questions in the affirmative. A jury would have a right to find that the defendant, in the exercise of ordinary care, should have supplied the tenants with keys to the laundry room so that it could be kept locked when the machine was not in use, and that he should have placed the socket higher up on the wall so that it would be beyond the reach of small children. The argument of defendant that the washing machine and wringer, as operated, was neither inherently dangerous to children nor attractive to them, is, in our judgment, without the slightest merit. In our view of this appeal the accident to the boy was just such an accident as might reasonably have been anticipated and foreseen by the landlord. It is difficult to understand how defendant could have expected that young children would not be attracted by and play with this machine, that was of an inherently dangerous nature to them. He knew that when a tenant was through using the machine there would remain, practically always, unused current, and that all that a child had to do to start the machine was to put the plug in the socket. It is a matter of common knowledge that in this day of electrical contrivances very small children quickly learn to put a plug in a socket and to take it out. The natural instincts of a boy of the age of Joel prompted him to do just what he did. Viewed in the best possible light for defendant, it was a question for the jury to determine whether the washing machine with the electrically operated wringer was of an inherently dangerous

nature to children of tender years who might be attracted by it and play with it, and the jury by their verdicts have answered that question. We find no merit in the instant contention of defendant, nor in the further contention that the verdicts are against the manifest weight of the evidence.

Defendant contends that the court erred in refusing to permit defendant to show that Joel Powell had been told not to go into the laundry room. When Berdie Powell, the mother of Joel, was being cross-examined she was asked the following question: "Q. Did you ever tell Joel not to go in the laundry room?" The objection of plaintiffs to the question was sustained. The following is the sole argument of defendant in support of his contention: "The ruling of the court was clearly error. Wolczek v. Public Service Co., 342 Ill. 432, 490." The case cited is an attractive nuisance case, where the boy was a trespasser, and the Supreme court, in passing upon the alleged implied invitation, held (p. 490): "The existence of such implied invitation [to the premises in question] may be disproved by evidence showing that the owner gave notice or warning which such child can understand to keep off the premises. Proof of such warning destroys the implication of the existence of an invitation, and if the child goes on the premises notwithstanding such warning he goes as a trespasser and the owner owes him no duty to protect him against danger." The plaintiff in the Wolczek case was eleven years of age at the time of the accident; here the plaintiff was only four years and ten months of age at the time of the accident and was therefore incapable of such conduct as would constitute contributory negligence.

Defendant next contends that the court erred in sustaining the motion of plaintiffs' counsel to strike an answer made by the witness Otto Herzog. During the examination of Herzog the following occurred: "Q. Did you ever know of any children prior to

June 25, 1941, being injured in the wash room? A. No, never was one injured." This answer was stricken upon motion of plaintiffs. Defendant cites Wolczek v. Public Service Co., supra, pp. 500, 501, in support of the contention. While it may be assumed, for the purposes of this appeal, that the question stricken would have been a proper one provided that the evidence showed that the conditions in the wash room had been always maintained without substantial change, there is no evidence in the record to prove that the conditions in the wash room had been so maintained, and counsel at the time the answer was stricken made no offer to supplement his proof in that regard. In making its ruling in the Wolczek case the Supreme court specifically stated that the evidence showed that there had never been a change in the conditions. Moreover, the following occurred during the examination of the witness Herzog: "Q. Do you know when this electric washer was put in the basement? A. Well, I know there was lots of them changed around. Some were out of commission and the washing machine company, when something was gone wrong with the washing machine -- the washing machine company would come in and change them around."

Defendant contends that the court erred in refusing the following instruction offered by defendant: "If you find from a preponderance of the evidence that Lewis G. Powell, one of the plaintiffs and father of Joel Powell, the other plaintiff, did not exercise ordinary care, either by himself or through others, for the safety of Joel Powell at and just preceding the time of the accident in question, and that such lack of care contributed to and proximately caused injuries to Joel Powell, then you are instructed that the plaintiff Lewis G. Powell cannot recover." No authority is cited in support of the contention. The instruction was not applicable to the facts of

this case. Here the evidence shows that the father was not at home at the time of the accident and was then engaged in his usual line of work at his business; that he was never in the laundry room and had no knowledge as to the washing machine and wringer. The boy, at the time, was in the company of his two sisters, both much older than he, and all of them had a perfect right to be in the basement. After the boy had darted away from the sisters and run into the laundry room, the door closed and in some way became locked. His sister Joyce took immediate steps to have the door unlocked. She had to go upstairs and see Mrs. Montgomery in order to get a key to the laundry room. Under the facts the jury might well have been misled by the instruction. See McClaren v. City of Gillespie, 250 Ill. App. 53, where the subject of the care required of children under seven years of age is treated at length.

Defendant contends that the trial court erred in refusing to give the following instruction offered by him: "The defendants are not liable in this case and you should return a verdict of not guilty against them unless you find from a preponderance of the evidence, first, that the washing machine and wringer in question were dangerous; second, that the defendants knew of the dangerous character of the washing machine and wringer or by the exercise of ordinary care would have known thereof before the accident in question; third, that the defendants should have anticipated before the accident in question that Joel Powell or other children would be injured by said washing machine or wringer while playing therewith. If either of the three above propositions is not established by a preponderance of the evidence, your verdict must be not guilty." (Italics ours.) This is a mandatory instruction and the parts that we have italicized condemn it. This instruction requires that plaintiffs prove, in order to recover, that the washing

machine and wringer were dangerous. Plaintiffs' case was not based upon the theory that the washing machine and wringer were dangerous to all that might use them, but that they were of an inherently dangerous nature to young children who might be attracted by the machine and play with it. The instruction also requires plaintiffs to prove that defendant should have anticipated that Joel Powell or other children would be injured by said washing machine or wringer while playing therewith. Such is not the law. The word "might" instead of the italicized word "would" would have been the proper word to use. Moreover, the trial court gave to the jury the following instruction offered by defendant: "The court instructs the jury that the defendants are not liable in this case unless you find, from the preponderance of the evidence, that the defendants knew or by the exercise of due care should have known on and before June 25, 1941, that Joel Powell, one of the plaintiffs, or other children, would have been attracted to the defendants' washing machine and wringer in the building in which said plaintiff lived and would be injured when such children were playing with the washing machine and wringer." This instruction should not have been given. It contains the same vice as the last one. It required plaintiffs to prove that defendants knew or by the exercise of due care should have known that children would be attracted to the washing machine and wringer and would be injured.

Defendant has had a fair trial, the verdicts and judgments were warranted by the evidence, and the judgments of the Circuit court of Cook county are affirmed.

JUDGMENTS AFFIRMED.

Sullivan, P. J., and Friend, J., concur.

43132

ELIZABETH ORR, for the use
of S. C. LURIE, etc.,
Appellant,

v.

FIRST NATIONAL BANK OF CHICAGO
et al.,
Appellees.

APPEAL FROM CIRCUIT
COURT OF COCK COUNTY.

MR. JUSTICE SCARLAN DELIVERED THE OPINION OF THE COURT.

S. C. Lurie, assignee, etc., appeals from a judgment entered in a garnishment proceeding in favor of the interpleader, Florence Orr.

In the case of Lorenz Kehl et al. v. Inmel State Bank, a corp., et al., judgments were obtained by the receiver of the bank against Elizabeth (Mrs. James P.) Orr and many other stockholders on July 3, 1934, and on January 23, 1942, all of the judgments were revived. The judgment against Mrs. Orr, in the sum of \$450.84, was thereafter assigned to S. C. Lurie, appellant. Execution issued on the judgment and it was returned "no property found" and "no part satisfied." Appellant then filed an affidavit for garnishment, in which he prayed that First National Bank of Chicago be summoned as garnishee, and summons issued. The verified answer of the garnishee to the interrogatories filed by appellant stated that at the time of the service of garnishment summons and interrogatories "it had recorded upon its savings department books and records a savings account in the name of Elizabeth Orr with a balance of \$1,039.46. * * * that it has been informed that the funds on deposit in the aforesaid savings account are the property of Florence C. Orr; that the said funds were deposited in said savings account in the name of Elizabeth Orr for convenience only; that Elizabeth Orr has no interest in said funds and that Florence C. Orr

is an adverse claimant to the said funds." As appellant now questions the right of the garnishee bank to incorporate in its answer the statement that Florence O. Orr made claim to the fund in the deposit account, we may state, at this point, that it was the duty of the garnishee to inform the court, if it had knowledge, that the fund was not the property of the judgment debtor but belonged to another. (See Dandridge v. Northern Trust Co., 218 Ill. App. 137, 141.) An interpleader was filed by Florence Orr, which alleges "that the monies in respect of which the garnishee, First National Bank of Chicago, alleges that it has on deposit in a Savings Account in the name of Elizabeth Orr, except the sum of \$39.46 and the accrued interest thereon, if any, was and still is the property of Florence Orr; that the said money was deposited in said account by Elizabeth Orr as the agent of Florence Orr and that as such agent or otherwise, Elizabeth Orr does not now and did not at any time have any right, title or interest in or to said money. Wherefore, she prays that this Court enter an order declaring that the said money, except the sum of \$39.46 and the accrued interest thereon, if any, lawfully and legally is her property and that she is lawfully entitled to the possession of the same * * *." The assignee filed an answer to the interpleader, in which he denied that the moneys on deposit in the First National Bank of Chicago were the property of Florence Orr, and alleges the moneys were the sole property of Elizabeth Orr; "that by virtue of the deposit of said fund in the name of Elizabeth Orr, said fund was then and there constituted the sole property of Elizabeth Orr, and that said Elizabeth Orr is the only person who could make withdrawals therefrom; that nothing appears in and by the records of said First National Bank of Chicago, as garnishee herein, wherein and whereby the interest of said Florence Orr in and to said

fund is established in any manner or form. Wherefore, * * * said S. C. Lurie prays that said inter-plea be dismissed."

The case was tried by the court, Judge Prystalski, who entered a judgment in which he found "that the funds on deposit in the Savings Account in the name of Elizabeth Orr with the First National Bank of Chicago, garnishee defendant herein, the sum of \$1001.04, in said account, is the property of Florence Orr, intervening petitioner herein; that said sum of \$1001.04 was held in trust for Florence Orr by Elizabeth Orr; that Florence Orr is entitled to the possession of said sum of \$1001.04, and the same is not subject to garnishment herein, and further finds that the sum of \$39.74 on deposit in said savings account is the property of Elizabeth Orr. It Is Therefore Ordered, Adjudged and Decreed that judgment be entered against the First National Bank of Chicago, garnishee defendant herein, on its answer heretofore filed herein, in the sum of \$39.70 in favor of Elizabeth Orr for the use of S. C. Lurie, assignee of Oak Park Trust & Savings Bank, etc." It is from that judgment that the assignee appeals.

Appellant states: "The Appellant's theory is that upon the answer of the garnishee being filed in which it is averred, 'that it had recorded upon its savings department books and records a saving account in the name of Elizabeth Orr with a balance of \$1039.46', the Appellant was then and thereupon entitled to a judgment in favor of Elizabeth Orr for the use of S. C. Lurie, and against the First National Bank of Chicago, as Garnishee for the amount of his judgment and costs; that funds deposited in a bank in the name of one person, who is recorded by the bank as being the owner of such funds, cannot be claimed by another in a garnishment proceeding; that garnishment is a proceeding by virtue of statute on the law side

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of the Court and that the garnishee as such, cannot administer equitably, funds on deposit with it."

The following are the alleged errors relied upon by appellant for a reversal of the judgment: "(1) The Trial Court erred in denying the motion of Appellant at the close of Appellant's case for a finding and judgment in his favor. (2) The Trial Court erred in admitting the testimony of Florence Orr on her Interplea. (3) The Trial Court erred in finding the sum of \$1001.04 to be the property of Florence Orr." As to point (2): When Florence Orr was called as a witness appellant made no objection as to her competency as a witness and he is, therefore, precluded from raising in this court the point made in contention (2). (See Chamblin v. New York Life Ins. Co., 292 Ill. App. 532, 535, and cases cited therein.) As to point (1) it is sufficient to say that as Florence Orr had filed an interpleader in the proceeding the trial court was bound to pass upon that interpleader before he could make a finding and judgment in the case. Florence Orr had a clear right to file an interpleader. Sections 11 and 12 of the Garnishment Act (ch. 62, pars. 11, 12, Ill. Rev. Stat. 1943) read as follows:

"11. Adverse claimants.] Sec. 11. If it appears that any goods, chattels, choses in action, credits or effects in the hands of a garnishee are claimed by any other person, by force of an assignment from the defendant, or otherwise, the court or justice of the peace shall permit such claimant to appear and maintain his right. If he does not voluntarily appear, notice for that purpose shall be issued and served on him in such a manner as the court or justice shall direct.

"12. Adverse claims - Trial.] Sec. 12. If such claimant appears, he may be admitted as a party to the suit,

so far as respects his title to the property in question, and may upon ten days' notice of the claim of such claimant to such property, stating the amount and character thereof, being served upon the garnishee, allege and prove any facts showing the right of such claimant to the possession of such property and such allegations shall be tried and determined in the manner hereinbefore provided. In case it appears that all or any part of such goods, chattels, choses in action, credits or effects are the property of such claimant and such claimant is then entitled to the possession thereof, the court shall order the delivery thereof to such claimant. If such person shall fail to appear after having been served with notice in the manner directed, he shall, nevertheless, be concluded by the judgment in regard to his claim."

Indeed, when Florence Orr filed the interpleader appellant did not question in any apt way her right to file it. He filed an answer to it in which he denied that any of the funds on deposit were the property of Florence Orr, and alleged that the fund was the sole property of Elizabeth Orr.

Appellant also contends that garnishment is strictly a legal proceeding and that "the equitable issues, if any, arising out of the ownership of this money, cannot be adjudicated in a garnishment proceeding." Section 24 of the Garnishment Act (ch. 62, Par. 24, Ill. Rev. Stat. 1943) provides:

"24. Equitable powers of court.] Sec. 24. When it shall appear that any garnishee has in his hands, or under his control, any goods, chattels, choses in action or effects, belonging to or which he is bound to deliver to the defendant, with or without condition, the court or justice of the peace may make any and all proper orders in

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The first thing I noticed when I stepped out of the car was the cold. It was a sharp contrast to the warm blanket I had been sitting under. I looked up at the sky, which was a pale, overcast grey. The air was thick with a damp, earthy smell, and the ground beneath my feet was wet and slick. I took a deep breath, feeling the moisture on my skin. The city around me was a blur of motion, with cars and pedestrians rushing by. I felt a sense of isolation, as if I were the only person in the world. The buildings were tall and imposing, their windows reflecting the light in a way that made them look like giant eyes. I walked slowly, my feet sinking into the wet pavement. The sound of my footsteps was the only sound I could hear, except for the distant hum of traffic. I felt a strange mix of emotions, a mix of fear and excitement. I was alone, but I was also free. I was in a new place, a place that was both familiar and strange. I looked down at my hands, which were clenched into fists. I felt a surge of energy, a sense of purpose. I knew that I was going to do something, something that would change everything. I took a step forward, and then another. I was walking towards something, towards a goal. I felt a sense of hope, a sense of possibility. The world was my oyster, and I was going to take it all. I looked up at the sky again, and I saw a single star shining brightly. It was a sign, a sign that I was not alone. I was part of something, part of a plan. I felt a sense of peace, a sense of calm. I was home.

regard to the delivery thereof to the proper officer, and the sale or disposition of the same, and the discharging of any lien thereon, and may authorize the garnishee to sell any such property, or collect any choses in action, and account for the proceeds thereof; or, if the proceeding be in a court of record, the court may appoint a receiver to take possession and sell, collect or otherwise dispose of the same, and make all orders in regard thereto which may be necessary or equitable between the parties."

In Fidelity Coal Co. v. Diamond, 322 Ill. App. 229, 240, 241, we held that the Garnishment Act confers equitable powers upon the court in garnishment proceedings.

Appellant contends that the trial court was not justified, under the evidence, in finding that the sum of \$1,001.04 was the property of Florence Orr. In Morris v. Carroso, 292 Ill. App. 620, we had before us a case similar to the instant one. In our opinion we stated (p. 625):

"A judgment creditor has no greater right to the property in the hands of the garnishee than has the judgment debtor and it is only the judgment debtor's property and credits which can be reached by process of garnishment, not the property and credits which he has in trust for others. (Hair v. North Western Nat. Bank, 50 Ill. App. 211; Dandridge v. Northern Trust Co., 218 Ill. App. 136.) The money in the accounts in the garnishee bank in the name of Vera Carroso, one of the original judgment debtors, was not subject to garnishment for the payment of the obligations of the said Vera Carroso since it was clearly shown to be the money of the intervening petitioner and held in trust for her by her sister."

In the instant case the trial court saw and heard the

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witnesses and in his decision he stated that he was satisfied that the sum of \$1001.04 in the deposit account was held in trust for Florence Orr by Elizabeth Orr, and that Florence Orr was entitled to the possession of said sum. After a careful examination of the evidence bearing upon the question we are are satisfied with the finding of the trial court.

The judgment of the Circuit court of Cook county is affirmed.

WALTER H. HARRIS.

Sullivan, P. J., and Friend, J., concur.

43343

PEOPLE OF THE STATE OF
ILLINOIS,

Defendant in Error,

v.

ANTHONY AVERSA,

Plaintiff in Error.

ERROR TO MUNICIPAL

COURT OF CHICAGO.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Anthony Aversa, defendant, sued out a writ of error to reverse a judgment of the Municipal Court of Chicago finding him guilty of the offense of pandering. By an order of this court the case of People of the State of Illinois v. Lewis Raymond, Gen. No. 43344, was consolidated for hearing with the instant case and it was provided in the order that the abstracts and briefs filed in the instant case should also stand as the abstracts and briefs in the Raymond case.

In each case the defendant was charged in an information with the offense of pandering. Defendants waived a jury trial and the trial court found each of the defendants guilty and sentenced each to serve six months' imprisonment in the House of Correction and to pay a fine of \$300. Each sued out a writ of error.

An agreed statement of facts was presented, approved and ordered filed in the Municipal Court of Chicago. It reads as follows:

"It is stipulated and agreed by and between the People of the State of Illinois and the defendants, Anthony Aversa and Lewis Raymond, that the following is a true and correct statement of the evidence introduced in the cases entitled, 'People of the State of Illinois vs. Anthony Aversa and Lewis Raymond, Nos. 44MC 58100 and 44MC 58102,' tried before His Honor, Judge Irwin Clorfene, Associate Judge of the Municipal

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1. The first step is to identify the problem or question that needs to be answered.

[illegible]

| Trial | Control (n = 10) | MCI (n = 10) | AD (n = 10) |
|-------|------------------|--------------|-------------|
| 1 | 95 | 85 | 75 |
| 2 | 95 | 85 | 75 |
| 3 | 95 | 80 | 70 |
| 4 | 95 | 75 | 65 |
| 5 | 95 | 75 | 65 |

1911-12-20

1. *Phragmites australis* (Cav.) Trin. ex Steud.

1. What is the purpose of the study?

Court of Chicago on August 25, 1944:

"Helen Broeker, the complainant, testified that while employed as a '26' girl at the Best Bet Inn, Broadway near Barry Avenue, Chicago, Illinois, the defendant, Anthony Aversa, a patron of the place, played the '26' game with her and while playing with her engaged her in a conversation. She told him she had recently come to Chicago from Wisconsin and that this was the best job she could obtain. The defendant, Aversa, told her he was a business man with good connections and could get her a good job. He took her telephone number and said he would call her soon. The following week he telephoned her requesting that she meet him on the corner of Diversey Blvd. and Clark Street in Chicago and that he would have her meet some of his business friends. She met him there and he then took her to the De Lazon Restaurant on Diversey Blvd. where he introduced her to a man whom he said was his brother and a young lady, Dorothy Udell, whom he stated was his sister. They had dinner there and spent two hours talking business in general and a possible job for the complainant. There was no discussion concerning sex, immoral or illicit dealings.

"After leaving the restaurant, all three went to the apartment of the defendant, Aversa, located at 540 Wellington Street, Chicago. Aversa's brother left shortly thereafter. Then the defendant, Aversa, left for about five minutes and returned to the apartment. Aversa said to the complainant, 'How about moving to a nicer hotel?' He said he could arrange for it. When she said that she could not afford it and owed a small bill at the hotel she was living in, Aversa said he would pay her old bill which amounted to Seven Dollars (\$7.00) and that he would also pay the rent for a better room in a better hotel. Aversa phoned the hotel where the complainant lived and told them that the complainant was checking out

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and that he would call and pick up her personal belongings. He then left and told the complainant to wait for his call.

"When Aversa left, the complainant remained with Dorothy Udell who explained to the complainant various ways of having sexual intercourse. Later Aversa called up and told them to meet him at the Pentemere Hotel on Diversey Blvd. Complainant and Dorothy Udell went to the Pentemere Hotel. Dorothy Udell left the complainant shortly after they arrived there. The complainant was met by the bellboy, Lewis Raymond, the defendant, who said 'you are already registered, I will take you up to your room.' She found her belongings already in the room. After a short while Aversa came in the room and told her that the bellboy would bring men to her room for intercourse and that she was to get at least five dollars from each man for each act, and turn the money over to Lewis Raymond, who would, in turn, give it to Aversa. He told her she would get Two Dollars out of every Five Dollars. He told her he would be back later and left. The bellboy, Lewis Raymond, brought up three men that night and she had sexual intercourse with them. She received the total sum of Nine Dollars (\$9.00) which she turned over to Raymond. The last act of sexual intercourse took place about 2:00 o'clock in the morning on August 23, 1944, and then later defendant, Aversa, came back and told complainant that from now on she was to do exactly as she was told by Raymond. She was not to go out and make any dates or have any affairs except as Raymond arranged it. If she did he would break every bone in her body. She then went to sleep and in the morning she talked to her girl friend and about 11:00 o'clock A. M. notified the police and filed a complaint.

"On cross examination she admitted that she had sexual

relations with men in Wisconsin prior to meeting Aversa, and had men visit her at her apartment in Chicago, but denied having sexual intercourse with them. She also admitted that she did not give any money to the defendant, Aversa.

"The arresting police officer testified that the complainant came into the police station at Town Hall and on August 23, 1944, about 11:00 o'clock A. M. made a complaint regarding Aversa.

"Dorothy Udell testified that she worked at the Preview Cocktail Lounge; that she was living with the defendant, Aversa, in the apartment visited by Helen Brooker, the complainant. She denied having any conversation with the complainant regarding sexual intercourse and denied that Aversa's brother was with them at the Delazon Restaurant.

"Lewis Raymond, the bellboy, testified that he is thirty-two years of age and that he was never in any trouble before in his life or that he had ever been arrested before this time. He denied that he brought any men to the complainant's room or that he received any money from the complainant.

"On cross examination he admitted that he knew the defendant, Aversa, before August 23, 1944.

"Anthony Aversa, defendant, testified that he is thirty-five years of age; that he was never arrested before in his life and was never in any trouble. He testified that he met Helen Brooker at the Best Bet Inn and played the '26' game with her. He said he invited her to dinner with his girl friend because she said that she was lonesome. She asked him to help her move and that he assisted her in moving to the Bentemere Hotel. He denied the charges contained in the information. He denied that he discussed any sex matters with her or that he told her that the bellboy, Lewis Raymond, would bring men to her room. He denied that he told her that she

that he told her that the following morning, Monday, April 10, 1967,

was to get Five Dollars (\$5.00) for each act of intercourse and that it was to be turned over to a bellboy. He denied making any threats.

"On cross examination, Aversa admitted that he had no source of income for the past six months. He explained this by saying that he had been sick and had had a serious operation. Prior to his illness he said he had worked in a gambling place for several years.

"At the conclusion of the evidence the Court found the defendants, Anthony Aversa and Lewis Raymond, guilty and sentenced the defendants to a term of six months in the House of Correction and a fine of Three Hundred Dollars (\$300.00).

"The Court overruled motions for new trial and arrest of judgment.

"Wm. J. Tuohy

"State's Attorney of Cook County

"By Samuel S. Siegel

"Assistant State's Attorney

"Charles L. Fellows

"Attorney for Defendants"

We find no merit in the contention raised on behalf of defendant Aversa that the trial court erred in denying his motion to quash the information against him. The information charges "that Tony Aversa alias Tony Udell the defendant, heretofore, to-wit, on the 22nd day of Aug A. D. 1944, at the City of Chicago, aforesaid, did unlawfully, knowingly and wilfully did cause, induce, persuade and encourage Helen Broeker, a female person who was then and there an inmate of a certain house of prostitution located at 601 W. Diversey Pkwy. Room 332 & 408 in the City of Chicago, Illinois, known to said Helen Broeker to be such house of prostitution, to remain therein as such inmate by the use of certain promises, threats, violence, devices and schemes, that is to say, by

threats to remain in said room and do acts of prostitution and so the defendant is guilty of the crime of pandering, contrary to the form of the statute in such case made and provided and against the peace and dignity of the People of the State of Illinois." Paragraph 170 of the Criminal Code (ch. 38, Ill. Rev. Stat. 1943) that defines the offense of pandering, was intended to cover the various devices and schemes by which the vile offense of pandering is practiced. The offense charged against defendant Aversa is a statutory one and the information follows the language of the statute and sets forth specific facts sufficient to apprise the defendant of the nature of the charge made against him. It appears from the record that no grounds were set up in support of the oral motion to quash. The agreed statement of facts shows that defendant Aversa and his attorney understood the nature of the charge that was made against him and evidence was introduced in his behalf to meet the charge. There is no claim made that defendant Aversa had any trouble in preparing and presenting his defense. No complaint is made as to the sufficiency of the information filed in the case against defendant Raymond. It charges that Raymond "unlawfully, and wilfully, did knowingly without lawful consideration, take, accept and receive a certain sum of money, to-wit, three Dollars, a certain thing of value, to-wit from Helen Broeker a certain female person, which said three dollars was a part of the earnings of said Helen Broeker from the practice by her of prostitution."

Defendants contend that "The People failed to prove beyond all reasonable doubt that the defendants were guilty of the crime charged in the information." They argue that the testimony of the prosecuting witness is contradicted by the testimony of the two defendants and of Dorothy Udell and

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that there is no evidence that corroborates the testimony of the prosecuting witness. In People v. Bolger, 359 Ill. 53, 68, 69, the court said: "The trial judge who heard the case saw and heard the witnesses testify. He had the opportunity to observe their conduct and demeanor while testifying and was in a better position to weigh their testimony than is a reviewing court. The law has committed to the jury, or to the trial court where a cause is tried by the court, the determination of the credibility of the witnesses and of the weight to be accorded to their testimony, and where the evidence is merely conflicting this court will not substitute its judgment for that of the jury or the trial court. People v. Mangano, 356 Ill. 178; People v. Portino, 356 id. 415; People v. Arbuthnot, 355 id. 577; People v. McPheron, 354 id. 381; People v. Herbert, 340 id. 320; People v. Yates, 339 id. 421; People v. Martin, 304 id. 494." The instant case is peculiarly one in which the above rule should be enforced. However, as counsel for The People argue, there are certain mountain peaks in the evidence that strongly corroborate the testimony of the prosecuting witness. Defendant Aversa, by his own testimony, had been an idler for six months, with no source of income. Prior to that time he had worked for two years in a gambling house. There is no evidence that he ever followed an honest occupation. Dorothy Udell was his mistress. The prosecuting witness had recently come to Chicago from Wisconsin and was practically a stranger here: the sort of woman that panderers seek. At an inn, where she was employed, Aversa told her that he was a business man with good connections and could get her a good job. He took her telephone number and said that he would call her soon. A week later he telephoned her that he wanted her to meet some of his business friends and he arranged a dinner at the DeLazon Restaurant. He then took the prosecuting witness and Dorothy Udell to the apartment

that he and Dorothy Udell occupied, and he there proposed that the prosecuting witness should move to a better hotel and that he would arrange the matter. When the prosecuting witness told him that she could not afford such a move and that she owed a small bill at the hotel where she was living, Aversa said he would pay the bill and also the rent for the room in a better hotel, and he telephoned the hotel where the prosecuting witness lived and told them that she was checking out and that he would call and pick up her personal belongings. He then left, and later telephoned the prosecuting witness and told her that she and Dorothy Udell should meet him at the Bentemere Hotel on Diversey boulevard, and when they went to that hotel the prosecuting witness was met by the bell boy, defendant Lewis Raymond, who said, "You are already registered, I will take you up to your room," and she found her belongings already in the room. The two defendants were acquaintances prior to the time in question. As counsel for The People argue, the uncontradicted evidence leads to but one reasonable conclusion, viz., that the two defendants were panderers, seeking to ply their trade through the prosecuting witness. There is nothing in the case to indicate that the prosecuting witness had any reason to make false charges against the defendants. It is apparent that she became frightened because of the threats made to her by defendant Aversa, and after consulting with her girl friend she decided to go to the police. The argument that defendant Aversa, an idler, with no source of income for the six months preceding the trial, befriended the prosecuting witness merely because he found that she was lonesome, and that he paid her bill at her hotel and personally moved her belongings to another hotel - selected by him - and paid her bill there, all out of the goodness of his heart, does not appeal to sound judgment. His whole conduct accords with that

practiced by professional panderers. Defendant Raymond played an important part in the scheme. He sent men to the prosecuting witness for purposes of prostitution. He kept track of her earnings and collected money from her for defendant Aversa. In the consummation of the pander scheme of Aversa it was necessary for the latter to have a willing assistant like Raymond.

After a careful consideration of the argument made on behalf of defendants, that the trial court was not warranted under the evidence in finding them guilty, we are satisfied that there is no merit in it, and that the judgment should be affirmed as to both defendants.

The judgment of the Municipal Court of Chicago finding defendant Anthony Aversa guilty of the offense of pandering is affirmed.

JUDGMENT AFFIRMED.

Sullivan, . J., and Friend, J., concur.

43344

PEOPLE OF THE STATE OF
ILLINOIS,

Defendant in Error,

v.

LEWIS RAYMOND,

Plaintiff in Error.

ERLOR TO MUNICIPAL

COURT OF CHICAGO.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This writ of error was consolidated for hearing in this court with the case of People of the State of Illinois v. Anthony Aversa, Gen. No. 43343, in which we have this date filed an opinion, and for the reasons stated in that opinion the judgment of the Municipal Court of Chicago finding defendant Lewis Raymond guilty of pandering is affirmed.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Friend, J., concur.

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